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MAHOMMEDAN LAW

COMPILED FROM

AUTHORITIES IN THE ORIGINAL ARABIC.

VOL. II.

CONTAINING THE LAW RELATING TO

SUCCESSION AND STATUS.

BY

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PREFACE TO THE SECOND EDITION.

THE favour with which the *Personal Law of the Mahommedans* was received by the practical lawyer as well as the student of comparative jurisprudence is sufficient evidence of the importance of the subject. I have endeavoured to make the present revised and enlarged edition a complete work of reference, dealing with the law relating to Succession and Status among the different schools recognised by Mahommedans. I hope I have succeeded in elucidating the principles by a comparative and analytical study of authorities like the *Radd-ul-Muhtâr*, the *Multeka*, the *Tanwîr-ul-Absâr*, the *Fatâwa Kâzi Khan*, the *Fatâwa Alamgiri*, &c., all of the highest value to the scientific jurist. For the Shiah Law, I have referred to the *Mabsût*, the *Ghunia*, the *Kitâb-ul-Intisar*, the *Jawâhir-ul-Kalâm*, &c.

A comparative study of Mahommedan Law, so rare among Mahommedan lawyers of the present day, has become a matter of necessity, owing to various circumstances to which I had only briefly referred in the Preface to the First Edition. Mutazalaism, with its progressive tendencies, has now obtained a strong hold among the younger generation. Non-conformity (*Ghair-Mukallidism*) is spreading rapidly among the older and puritanical sections; and there are on all sides evident signs of a widening in legal ideas and conceptions, based upon a liberal interpretation of the law laid down in the works to which I have referred.

It is hoped that this treatise may also be of some use in the practical administration of the country.

CALCUTTA, AMEER ALI.

2nd February 1894.

PREFACE TO THE FIRST EDITION.

To those not born and bred within the pale of Islâm, the study of the Mussulman Law is usually attended with great difficulties. The works which at present exist in the English language are few in number; and though France has been more prolific in this respect, the valuable contributions of the Moslems to the Science of Jurisprudence and Law are, for the most part, wrapped in the intricate folds of a language as difficult to acquire as it is copious in its diction.

In India, even among educated Moslems, a knowledge of the Mussulman Law, if not actually obsolete, has become extremely rare. Few cultivate it as a science, or study it analytically as a branch of comparative law. Those who apply themselves to its study are satisfied with a barren and unprofitable acquaintance with the simple rules of inheritance. This is the consequence of the policy inaugurated by Lord William Bentinck. Prior to his time, the Mussulmans occupied the foremost position among the people of India. The cultivation of their law and their literature was encouraged by successive British Governors; their traditions were respected, and they themselves were treated with a certain amount of consideration due to the former rulers of the land. All this changed under Lord William Bentinck's administration, and the Indian Mahommedans were relegated into the cold shade of neglect. Their institutions gradually died out, and the old race of *Moulvîs* and *Muftîs*, who had shed a lustre on the reigns of the Marquis of Wellesley and the Marquis of Hastings, became extinct. Whilst the French in Algeria were endeavouring to give a new impetus to the cultivation of Moslem Law and literature by subventions and Government assistance, and whilst they were utilising the indigenous institutions with the object of improving the condition of their subjects, the British in India allowed the study of every branch of

Mahommedan learning to fall into decay. The mischief which has resulted from this mistaken policy can hardly be overrated. Owing to an imperfect knowledge of Mussulman Jurisprudence, of Mussulman manners, customs and usages, it is not infrequent, even now, to find cases decided by the highest Law Courts against every principle of the Mahommedan Law. It is not surprising, therefore, to learn that every miscarriage of justice adds to the long roll of indictment which the popular mind has framed against the British rule in India. Latterly a desire, no doubt, has been evinced by some of the Local Governments—notably by the Governments of Bengal and of Madras—to repair to some extent the evils caused by the neglect of half a century. Nothing tangible, however, has yet been achieved towards securing efficient administration of justice in Mahommedan cases.

Owing to the broad divergencies existing between the various legal schools, no branch of the Mahommedan Law is perhaps more difficult to master than that relating to personal status.

The treatise which I now place in the hands of the public is intended to obviate partially those difficulties, and supply in some measure the want of a compendious work on the Mahommedan Personal Law. I have embodied in it the substance of a series of discourses delivered by me in several sessions as Lecturer on Mahommedan Law at the Presidency College of Calcutta. To this I have added a synoptical sketch of the Sunni and the Shiah Law of Inheritance.

I have endeavoured in the following pages to deal with the subject from a comparative and analytical point of view. How far I have succeeded, I leave to the public to judge.

I venture, however, to hope that, as this treatise is entirely *sui generis* and tentative in its character and scope, a generous reception will be accorded to it, in spite of defects which it must necessarily contain.

In order that this volume should be useful to the practical lawyer as well as to the student, I have carefully verified the legal dicta and scrupulously given my references.

Before mentioning the original authorities I have consulted, a few remarks on the works already in existence in the European languages will not, I think, be without interest to the reader.

Macnaghten's *Principles and Precedents of the Mahommedan Law*, Hamilton's translation of the Persian version of the *Hedâya*, Baillie's *Digests*, Shama Churn Sircar's *Lectures*, and Mr. Rumsey's *Law of Inheritance*, are the only works in the English language which require any specific mention. Until recently, Macnaghten's work was regarded as the greatest authority on Mussulman Law, though latterly it has fallen much in the estimation of lawyers and Judges. I venture, however, to think that, in spite of many defects and frequent inaccuracies, Macnaghten's Synopsis of the Hanafî and the Shiah Law may safely be regarded as the most useful elementary treatise for students preparing for public examinations.

Hamilton's translation of the *Hedâya* is of great practical value to those who can discriminate between the doctrines of the various Sunni schools. The difficulty, however, which lawyers frequently have in finding out in the *Hedâya* the principles actually in force among the Hanafîs, detracts much from its usefulness.

Mr. Baillie's *Digests* are a free paraphrase of portions of the *Fatâwa Alamgiri* and the *Sharâya-ul-Islâm*. They are works of great merit, and afford considerable assistance to all engaged in the study of Mahommedan Law. In spite of Mr. Baillie's great erudition, inaccuracies are to be found, to one of which prominent attention was directed in the case of *Musst. Asloo*.[1]

The usefulness of these *Digests* would have been greatly enhanced, if Mr. Baillie had thought it worth his while to give in every case, as he has done in some instances, the references to the authorities he was paraphrasing or translating. This omission has been, to some extent, supplied by Babu Shama Churn Sircar, whose lectures in other respects are, in the main, transcriptions of Baillie's *Digests*. His introductions are of great value to all lawyers anxious to study scientifically Mussulman Jurisprudence.

Mr. Rumsey's treatise is an extremely valuable and comprehensive work on the Hanafî Law of Inheritance.

The French works on Mussulman Law and Mussulman Jurisprudence throw into shade anything existing in the English language. D'Ohsson's *Tableau Générale de l'Empire Ottoman*, published under

[1] 20 Weekly Reporter, p. 297.

the patronage of the King of Sweden in 1778, will always remain a magnificent monument of Western genius and industry. It contains by far the most complete and correct summary of the Hanafî Law, civil, criminal, political and moral, in force in the Ottoman Empire.

Besides D'Ohsson's grand work, Perron, Sautayra, Querry, Sicé, Lasalle, DeMénorville, DuCaurroy, Vincent, and various others have enriched the French language with valuable contributions on Mahommedan Law. All these authorities have proved of great value to me in preparing the present treatise.

The historical portion of my Introduction is founded on the *al-Kâmil* of Ibn-al-Athîr, and the judicial on Imâm Fakhruddîn Râzî's *al-Mahsûl* (المحصول),[1] the *Mukkadamât* of Ibn-Khaldûn,[2] the *Millal-wan-nihal* of Shahrastânî,[3] and D'Ohsson's *Tableau Générale.*

The principles of the Shiah Law have been derived from the *Sharâya-ul-Islâm*, the *Mafâtîh*, the *Irshâd-ul-Allamah*, and the *Jâmaa-ush-Shittât*. This last work is a valuable digest of Shiah cases, and the dicta contained therein have an authority equal to those of the *Fatâwa Alamgiri* among the Hanafîs. Besides the above I have also consulted the *Nail-ul-Marâm*, the *Jâmaa-i-Abbâsi*, the *Mabsût*, and the *Tahrîr-ul-Akhâm*. For Shiah traditions I have referred to the *Bihâr-ul-Anwâr*.

For the Hanafî Law, I have consulted the two *Fatâwas*, the *Kanz-ud-Dakâik* (Persian translation), the *Hedâya* (English and Persian translations), the *Fusûl-ul-Imâdia*, the *Inâya*, the *Kifâya*, the *Durr-ul-Mukhtâr*, the *Radd-ul-Muhtâr*, *Ibrâhîm Halebî*, *&c.*

For the Shâfeî and Mâlikî Law, the *Kitab-ul-Anwâr*, the *al-Muharrar*, the *Iktilâf-ul-Aimmah*, Perron's translation of *Sîdî Khalîl*, Sautayrâ, &c.

In addition to those already mentioned, I have referred to a number of other works all of which are specifically mentioned in the notes.

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[1] India Office Copy, A. b., p. 319.

[2] Du Slane's Translation, *Prolegomenes d Ibn-Khaldoun.*

[3] Cureton's Edition.

Whilst acknowledging the various authorities to whom I have been greatly indebted, I desire in this place to convey my thanks to Dr. Röst and Mr. A. G. Macpherson, Legal Adviser to the Secretary of State for India, for allowing me the unrestricted use of the India Office Oriental and Law Libraries.

The importance at this moment of the study of the Personal Law of the Mahommedans cannot, I think, be overrated.

Belonging myself to the little known, though not unimportant, philosophical and legal school of the Mutazalas, and thus occupying a vantage ground of observation as regards the general progress of ideas among other sections of the Mussulmans in India, I cannot but observe the movement which has been going on for some time among them. The advancement of culture, and the development and growth of new ideas, have begun to exercise the same influence on them as on other races and peoples. The young generation is tending unconsciously towards the Mutazalite doctrines, whilst the old, if Shiahs, become Usulis, and if Sunnis, Puritans of the Wahâbî type.

It must not be supposed, however, that this movement results from the weakening of the Islâmic faith. It originates more from the desire to revert to the pristine purity of Islâm, and to cast off the excrescences which have marred its glory in later times. The progress of thought is chiefly evidenced by the views which the great majority of Moslems now entertain respecting the institutions of polygamy, slavery, and the facility of divorce without the sanction of the Kâzi. Whatever may have been the necessity for polygamy in the earliest stages of society, in modern times it can only be regarded as an unmitigated and unendurable evil. Owing to the growth of these views and a better appreciation of the spirit of the Koran, the Moslems of India generally look upon polygamy as opposed to the Islâmic precepts.

To me it appears that great changes are imminent in the social institutions, and the personal laws of the Indian Mussulmans. How they will be achieved, whether by a general Synod of Moslem doctors or by the direct action of the Legislature, it is impossible to say.

In view of this imperceptible current of ideas, imperceptible perhaps to outsiders, but not to those who live within the bosom of

Islâm, it is particularly necessary that those who hold in their hands the destiny of India should pay attention to the laws of the only homogeneous people in that country.

Should this treatise prove useful in extending a more general knowledge of the Personal Law of the Mahommedans, I shall consider myself amply repaid for the time I have devoted to this, my holiday task.

AMEER ALI.

REFORM CLUB,

20th December, 1880.

CORRIGENDA.

Page 46, line 3 from bottom, for "Zapia" read "Zakia."
Page 179, line 20, omit "however."
Page 273, line 14, for المصلعت read المصاهرت
Page 319, line 28, for "Moslem" read "Moslemah."

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ADDITIONAL CORRIGENDA.

Page 343, for line 15, from "under the Mahommedan Law," to line 29 "the Judge," substitute the following :—

"Apostasy from Islâm on the part of the husband has the effect of dissolving the marriage-tie, both according to the Sunnis and the Shiahs. The Native Converts' Marriage Act (XXI of 1866) was specially designed to meet the case of converts to Christianity from Hinduism and other cognate creeds, which do not recognise the dissolution of a marriage once contracted. It exempts, however, from its purview Mahommedans and Jews. It defines a 'native husband' to mean a married man domiciled in British India, who shall have completed the age of sixteen years, and shall not be a Christian, a Mahommedan or a Jew: a 'native wife' to mean a married woman domiciled in British India, who shall have completed the age of thirteen years and shall not be a Christian, a Mahommedan or a Jewess; and 'native law' to mean any law, or custom having the force of law, of any persons domiciled in British India other than Christians, Mahommedans and Jews.

"In the case of *Gobardhan Dass* v. *Jassadamoni Dassi* (I. L., 18 Cal., p. 252), the parties were Hindus and were married whilst professing the Hindu faith. After their marriage they both became converts to Christianity. Upon a petition by the husband under the Indian Divorce Act (IV of 1869), the High Court of Calcutta held that the conversion to Christianity of one or both of the parties did not *ipso facto* dissolve the union. The same principle would apply to a case where the parties are Mahommedans. In fact, the Mahommedan Law provides that when the married couple apostatise together the marriage remains intact. So, also, if the woman were to become a pervert, the Jurists of Balkh have decided that the marriage would not be dissolved.[1] The passage in page 346 from the *Durr-ul-Mukhtâr* must, therefore, be read subject to this explanation. Some lawyers think that the *dictum* in the *Durr-ul-*

[1] *Radd-ul-Muhtâr*, Vol. II, p. 644.

Mukhtâr should be confined to a perversion on the part of the woman to any other but a scriptural creed. Should the husband apostatise and the wife, though continuing in her own faith, elect to live with him after his apostasy, the cohabitation, nevertheless, would be invalid.

"Under the Shiah Law, also, there is the same difference of opinion regarding the effect of the woman's apostasy on the marriage.

"When the married couple are idolaters and both were to adopt Islâm, the marriage would remain intact; so, also, if the husband were to adopt Islâm and the wife Christianity or Judaism."

Page 346, line 2, for "*ermst*" read "terms."

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INTRODUCTION.

THE Jurisprudence of the Moslems occupies a pre-eminent position among the various systems which have, at different times, been in force among different communities. Considering the circumstances under which it originated, the difficulties it had to contend with, and the backward condition of the people among whom it attained its development, it may be regarded as one of the grandest monuments of the human intellect. The legislation of Mohammed has, accordingly, a special significance for philosophic observers whom the study of the progress of mankind, as evidenced in the laws of society, attracts and interests. The resemblance which the Islâmic regulations bear to pre-Mahommedan institutions in some of their essential features deserves careful consideration, as it serves to show the points of contact between the old conditions of society, stigmatised by the Mussulmans as the Ayyâm-i-Jâhilyat ("the days of ignorance") and the reformed system. This resemblance has induced some critics to charge Mohammed with plagiarism. It seems to us, however, that the charge is founded upon an erroneous conception of Arab society as it existed in those days. At the time when Mohammed promulgated his laws, the Jews were, probably, the only people inhabiting the Arabian peninsula who possessed any organic institutions; they formed strong communities in the midst of the pagan Arabs, governed by their own special code. The intimate connection which from time immemorial existed between the Arabs and the Jews, joined to the belief that they were both descended from a common stock, had tended to engraft many Jewish ideas upon Arab manners and customs. In the relations of domestic life, especially, the influence of the Jews was most strongly marked. Mohammed, in his efforts to introduce a purer faith and a healthier organisation among his people, did not so entirely overlook the exigencies of society and

the requirements of human growth as to denounce all existing institutions, the inevitable result of which would have have been to reduce everything to chaos. His constructive mind perceived in them the germs of development, and accordingly he allowed them a place in his system, with such modifications and alterations as would bring them into harmony with a progressive condition of society. But there can be little doubt that the vestiges of ancient and archaic manners and customs in Mussulman Jurisprudence are more or less temporary in their character.[1]

Whilst the similarity of the personal law of the Mahommedans to the Hebraic domestic regulations can be satisfactorily explained by the presence of the Jews in the midst of the Arabs, the resemblance which certain features of the Mussulman Law bear to Roman Jurisprudence does not admit of so easy a solution. Ibn-Khaldûn explains it as the effect of Byzantine learning on Saracenic thought. The Abbasside sovereigns were, no doubt, surrounded by men versed in Greek and Roman literature and science. It is not unlikely that the influence of those scholars and philosophers extended to the jealous circle of the legists. It is also possible that the remains of Byzantine learning in Syria and Egypt may have affected the juridical conceptions of the men who, in the second and third centuries of the Mussulman era, built up the Sunni system of law. The principles of the Law of Pre-emption, with its fine distinctions regarding servitudes, coparcenary, &c., give rise to an impression that, though the foundations of the law were laid in Hijâz, the finishing touches were given in places where foreign conceptions had grown up round purely Saracenic ideas. The position, therefore, of the Mussulman legal system seems to be this, that whilst the major portion of its rules regarding domestic institutions bears the closest analogy to the Hebraic laws, the principles which regulate the dispositions of property have little in common with the Hebraic system but offer a strong resemblance, in certain instances, to the principles of Roman Jurisprudence.

The Koran.

The Mussulman legists trace almost all the principles to the Koran. It is supposed, in fact, to contain the fundamental principles which regulate the various relations of life; the religious, civil,

[1] See the *Spirit of Islam*, p. 285.

and criminal laws which provide for the constitution and continuance of the body politic; and even the germs of political rules and social economy. The absence of a systematic arrangement is explained by the circumstance that the Code was gradually built up during the lifetime of the Prophet. The moral principles and the legal rules, which make up the work, were enunciated, not simultaneously as a completed code of laws, but in accordance with the exigencies of the moment and the requirements of each special case.

The Koran, however, was never intended to form a complete code of laws. Its silence on many points, legal as well as doctrinal, is supplemented by the oral precepts delivered from time to time by the Prophet, and by a reference to the daily mode of his life as handed down to posterity by his immediate followers. The unhappy religious schism which at the present moment divides the Mahommedan world into the two great sects of the Shiahs and the Sunnis, owes its origin chiefly to the relative value attached to the various traditions, according to the source from which they are received. Very shortly after the decease of the Arabian Lawgiver, it became habitual with some of those who had been, during his lifetime, intimately associated with him, but who had never lost their inimical feelings towards his family, to throw into the background all the traditional sayings of the Founder which appeared to support the rightful claims of his son-in-law to the Caliphate. The traditions which purport to be handed down from Abû Huraira, Âyesha, and others, bear evident traces of jealousy towards the members of Mohammed's family.[1] These traditions are accordingly rejected, with few exceptions, by the partisans of the *Ahl-i-Bait*.

Abû Bakr, who was elected to the Caliphate immediately after the decease of the Prophet, had directed that the traditional sayings should be collected and embodied in an authoritative work before they had faded from the memory of men; but he did not survive to see it completed. The first collection did not appear until the reign of Osmân, the third Caliph.

The question of the *Imâmate*, the spiritual headship of the Mussulman Commonwealth forms the most distinctive feature of difference between the Sunnis and the Shiahs, and gives a

The *Imâmate*.

[1] The *Ahl-i-Bait*, "People of the House."

characteristic complexion to the juridical doctrines of the two schools. The Shiahs repudiate entirely the authority of the *Jamâat* (or the universality of the people) to elect a spiritual chief who should supersede the rightful claims of persons indicated by the Founder of the Faith ; whilst the Sunnis regard the decisions of the assemblies, however obtained, as of Œcumenical importance. The question came up for discussion and settlement immediately on the decease of Mohammed, when it became necessary to elect a Caliph or successor to the Prophet to assume the leadership of Islâm. The Hâshimites, the kinsmen of Mohammed, maintained that the office belonged by right to Ali,[1] as one who had been pointed out by the Prophet as his successor. The other Koreishites, who were traditionally hostile to the Banî Hâshim, insisted upon proceeding by election. Whilst the Banû Hâshim were engaged in the obsequies of Mohammed, Abû Bakr was elected to the office of Caliph by the votes of the Koreish.

Abû Bakr died in the third year of his Caliphate, and was succeeded by Omar (*Ibn-al-Khattâb*). Under this great man the conquest of Syria, Egypt and Persia was achieved by the Moslems. Upon his decease the Caliphate was offered to Ali on the condition that he should govern in accordance with the precedents established by the two former Caliphs. Ali declined to accept the office on those terms, declaring that in all cases respecting which he found no positive law or decision of the Prophet, he would rely upon his own judgment. This notable declaration forms another point of difference between the Shiahs and the Sunnis. The Caliphate was then offered to Osmân,[2] who consented to the terms imposed by the electoral body. The legal divergence between the Sunni and the Shiah schools dates virtually from this epoch. The willingness of Osmân to follow implicitly the precedents established by Abû Bakr and Omar, without any question as to their applicability to the ever-varying exigencies of human life, impressed a distinctive character upon the Sunni doctrines. Both Abû Bakr and Omar had, during their Caliphates, deferred to Ali's exposition of the law, and judgments were invariably given according to his

[1] The son-in-law and cousin of the Prophet. He married Mohammed's daughter, Fâtima, from whom the descendants of Mohammed take their name of *Banî-Fâtima* (the Fatimides).

[2] Osman was the son of Affan, the son of Ab-ul-aff, the son of Ommeyya

interpretation of the traditions. Osmân seems to have set a different example. This well-intentioned but weak chief, governed entirely by his secretary and kinsman, Merwân, afterwards a Caliph himself, was killed, after a short and troubled reign, by the revolted Egyptian soldiery led by Mohammed, the son of Abû Bakr. Upon his death Ali was elected to the Caliphate. His accession was the signal for two fierce revolts on the part of the opposite faction. The one headed by Âyesha, the daughter of Abû Bakr, was suppressed without much difficulty ; the other was more successful. Osmân had, during his lifetime, appointed one of his kinsmen, Muâwiyah, the son of Abû Sufiân, to the governorship of Syria. This ambitious chief perceived in the murder of Osmân an opportunity for his own aggrandisement; and the insurrection raised by him proved, indirectly, the cause of the many disasters which have befallen Islâm. Defeated in several consecutive battles, he appealed to arbitration, which was agreed to by Ali with the object of avoiding further bloodshed. Abû Mûsa al-Ashaâry was appointed an arbitrator on behalf of the House of Mohammed, and Amr ibn-al-Aâs on behalf of Muâwiyah. Amr[1] persuaded Abû Mûsa that, with the view of healing the wounds which the differences between Ali and Muâwyiah had inflicted on the Moslem world, it was necessary to set aside both chiefs and elect another Caliph. Abû Mûsa agreed to the suggestion, and on the people assembling to hear the verdict of the arbitrators, he pronounced the deposition of both Muâwiyah and Ali. He was followed by Amr ibn-al-Aâs, who declared that he agreed with Abû Mûsa in deposing Ali, but that he confirmed Muâwiyah in his office. The boldness of the artifice, and the shamelessness with which it was carried into effect, struck with dismay all those who had seen in the arbitration a means for preventing further bloodshed in Islâm. This proceeding of Amr ibn-al-Aâs exasperated the Fatimides, and both parties separated vowing undying hatred towards each other. Ali was shortly after assassinated whilst engaged in prayers[2] in a mosque at Kûfa. His assassination enabled Mûawiyah to consolidate his power both in Syria and Hijaz.

Until the accession of this chief to the office of the Caliphate, which the stern virtues of the early Caliphs had sanctified and

[1] The Amru who conquered Egypt under the Caliph Omar.

[2] 11 Safar A.H. 37, 28 July A.C. 657.

adorned, no distinctive appellation was assigned to or assumed by either party. The partisans of Ali were known simply as the Banî Hâshim. Under Muâwiyah, the followers of the House of Mohammed began to call themselves *Shiahs* or "adherents" and their enemies *Nawâsib*, rebels, or *Khawârij* (insurgents or deserters). The Fatimides adopted green, the colour of the Prophet, as the symbol of their cause; the Banû Ommeyya, on the other hand, assumed white for their standard. Up to this time the divergence between the two factions was chiefly political and dynastic. Under the Abbasides, the faction which advocated the principles of election in preference to hereditary succession adopted the name of *Ahl-us-Sunnat wa-Jamâat* ("People of the Traditions and the Assembly.") Their doctrinal and legal differences began now to assume the type, and proportions they retain at the present moment.[1] The Shiahs reject not only the decisions of the Œcumenical Councils, but also all traditions not handed down by Ali or his immediate descendants—those who had seen the Prophet and held familiar intercourse with him.

The Shiah doctrines.

According to the Shiah doctrines, the oral precepts of the Prophet are in their nature supplementary to the Koranic ordinances, and their binding effect depends on the degree of harmony existing between them and the laws of the Koran. Thus, those traditions which seem to be in conflict with the positive directions in the text are considered to be apocryphal. The process of elimination is conducted upon certain recognised principles founded upon logical rules and definite data. These rules have acquired a distinctive type among the Mutazalas, who have eliminated from the *Hadîs Kudsî* (the holy traditions) such alleged sayings of the Prophet as appeared incompatible and out of harmony with his developed teachings as explained and illustrated by the philosophers and jurists of his race.

The Sunni doctrines.

The Sunnis, on the other hand, base their doctrines on the entirety of the traditions. They regard the concordant decisions of the successive Caliphs and of the general assemblies (*Ijmâa-ul-Ummat*) as supplementing the Koranic rules and regulations, and as almost equal in authority to them.

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[1] See, however, the *Spirit of Islâm*, where I have given a fuller account of the origin of the two sects, p. 462.

According to the Sunni doctrines, the sources of the Mahommedan Law are invariable in their order and limited in their number. With reference to these fundamental bases of jurisprudence, as they are called, there is little or no divergence among the several branches of the Sunni school, though they differ much in their mode of interpretation and exposition of the laws. (1) The Koran; (2) the *Hadîs*, or *Sunnat* (traditions handed down from the Prophet); (3) the *Ijmâa-ul-Ummat* (concordance among the followers); and (4) the *Kiyâs* (private judgment), constitute the bases upon which Sunni jurisprudence is essentially founded. The *Hadîs* (pl. *Ahâdîs*) embraces (*a*) all the words, counsels, and oral laws of the Prophet (*Kawl*;) (*b*) his actions, his works, and daily practices (*Fyl*); (*c*) and his silence (*Takrîr*), implying a tacit approbation on his part of any individual act committed by his disciples. The rules deduced from these subsidiary sources vary considerably in respect of the degree of authority which is attached to them. If the rules, or traditional precepts, are of public and universal notoriety (*Ahâdîs-ul-mutwâttirèh*), they are regarded as absolutely authentic and decisive. If the traditions, though known publicly by a great majority of people, do not possess the character of universal notoriety, they are designated as *Ahâdis-ul-mashhûra*, and stand second in rank to the *Ahâdis-ul-mutwâttirèh*; whilst the *Akhbâr-ul-wâhid* which depend for their authenticity upon the authority of isolated individuals, have little or no value attached to them. Thus every tradition purporting to be handed down by the contemporaries and companions of the Prophet, regardless of their actual relationship to him, is considered to be authentic and genuine, provided certain arbitrary conditions framed with the view of testing the value of personal testimony are complied with.

(3) *Ijmâa-ul-Ummat* implies general concordance. Under this collective name are included all the apostolic laws, the explanations, glosses, and decisions of the leading disciples of the Prophet, especially of the first four Caliphs[1] (the *Khulâfâi-Râshidîn*) on theological, civil, and criminal matters.

(4) *Kiyâs* the exercise of private judgment, forms the principal point of difference among the four subdivisions of the Sunni school of jurisprudence.

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[1] Abû Bakr, Omar, Osmân and Ali.

The Shiahs do not admit the genuineness of any tradition not received from the *Ahl-i-Bait* ("the People of the House") consisting of Ali and Fâtima and their children, and repudiate entirely the validity of all decisions not passed by their own spiritual leaders and Imâms. In the application of private or analytical judgment and in drawing conclusions from the ancient precedents they also differ widely from the Sunnis.

Before we trace, however, the development of the Sunni schools, it is necessary to sketch briefly the fortunes of the House of Ali, for the temporal condition of the Fatimides moulded the doctrines of their followers in many respects. On the assassination of Ali, Hassan, his eldest son, was raised to the Caliphate in Irâk (Mesopotamia). Fond of ease and quiet, the bitter dynastic jealousies and religious hatred of the various factions which divided the Moslem world wearied him, and he soon abandoned the high position to which he had been elevated, and retired into private life. The animosity of the Ommeyyades pursued him even in retirement, and he was poisoned not long after at the instigation of Yezîd, the son of Muâwiyah. This Domitian of the House of Ommeyya succeeded in inveigling into his power Hussain, the second son of Ali, and massacred him, together with almost all the male descendants of the Prophet, on the plains of Kerbela, whilst they journeyed towards Kûfa. One sickly lad alone escaped this ruthless butchery. This youth, who also bore the name of Ali, was afterwards surnamed *Zain-ul-aâbedîn* ("the Ornament of the Pious") for his piety and patience. He was the son of Hussain by the daughter of Yezdjerd, the last Sassanide King of Persia, and in him was perpetuated the House of Mohammed. He represented also in his mother's right the claims of the Sassanians to the throne of Irân.

From this time the descendants of the Prophet became the objects of fierce persecutions on the part of the Ommeyyades. The jealous suspicion and untiring animosity of the children of Abû Sufiân followed them everywhere without mercy. During the reign of Omar ibn-Abdul Azîz, the seventh Caliph of the House of Ommeyya,[1] the fury, with which the Fatimides had been persecuted, to some extent, abated—only, however, to burst forth anew upon

[1] A.H. 99, A.C. 717.

his death. In the year A.C. 747 (127 Hijra) Abu'l Abbâs Saffâh[1] destroyed the Ommeyyades and founded upon their ruin the dynasty of the Abbassides.

The halo of veneration which surrounded the Banî-Fâtima in the eyes of the people, and their universal popularity, often provoked the vengeance of the Banî-Abbâs, and formed an excuse for continuous repression and frequent persecution. This lasted until the reign of Abdullâh al-Mâmûn, the noblest Caliph of the House of Abbâs, who, on his accession to the Caliph, resolved to place the children of Fâtima on the throne. He accordingly named[2] Ali ibn-Mûsa, surnamed Rezâ (" the Acceptable "), the eighth Imâm of the Fatimides, as his successor, and gave his sister Umm-ul-Fazl in marriage to this prince.[3] He also abandoned the black, the Abbasside colour, in favour of the green, which, as stated before, was the recognised standard of the Fatimides.

Al-Mâmûn also adopted the advanced doctrines of the Mutazalas, the rationalists of Islâm, and tried to introduce their teachings throughout the empire, but the fanaticism of his people proved too powerful for him. Ali ibn-Mûsa ar-Rezâ was poisoned by the infuriated Abbassides, and Mâmûn was forced to resume the black as the colour of his House. The tolerance shown by him to the Fatimides was continued by his two immediate successors (Muttassim and Wâssik). The accession of Mutawakkil[4] was the signal for a new and fierce persecution which lasted during the whole fifteen years of a reign signalised by gross cruelty and debauchery. He was succeeded by his son Muntassir, whose first care was to restore the tombs of Ali and Hussain, destroyed by Mutawakkil, and to re-establish the sacredness of their memory so wantonly outraged by his father. The sagacity of this Caliph was imitated by his successors, and some degree of toleration was thenceforward extended to the Shiahs. In the year 334 A. H. (A. C. 945) Muizuddowla (the Deilemite), of the House of Buwaih, became the Mayor of the Palace at Bagdad. An enthusiastic partisan of the Fatimides, he entertained at one time, the design of deposing the

Al Mâmûn

[1] A descendant of Abbâs (one of the uncles of the Prophet), from whom the family derived the name of Banî-Abbâs

[2] A H. 201, A.C. 816

[3] The Razawy Syeds are descended from the Imâm Ali ibn-Mûsa ar Rezâ.

[4] A.H. 232, A C. 847.

Abbasside Caliph Mutiullah, and placing in his stead some scion of the House af Ali, but he was restrained by motives of policy from carrying this project into effect.

Muizuddowla also instituted the *Yeum-ul-aâshûra*, the day of mourning, in commemoration of the martyrdom of Hussain and his family on the plains of Kerbela.[1]

In the year A.H. 645 (A.C. 1247) under Muttassim B'illâh another fierce persecution of the Shiahs broke out, the consequences of which proved, in the end, disastrous to Saracenic civilisation, engulfing in one common ruin the western Asians. Impelled by the perfidious counsels of the fanatics who surrounded him, this imbecile Pontiff of the Sunni Church doomed the entire male community of the Shiahs to massacre.[2] By a terrible edict, unparalleled in the history of persecutions, he permitted the orthodox to plunder the goods, demolish the houses, ravage the fields, and reduce the women and children of the Shiahs to slavery. This atrocious conduct brought upon the ill-fated city of Bagdad the arms of the avenging Hulâkû, the grandson of Chengîz. For three days the Tartar chief gave up the town to rapine and slaughter. On the third day the thirty-seventh Caliph of the House of Abbâs was put to death with every circumstance of ignominy; and so ended the Abbasside dynasty!

The persecutions to which the Shiahs were, from time to time, subjected, and the mysterious disappearance of their last Imâm, have induced among them the belief that though *ghâib* (absent) he is yet alive, and that he will soon make his appearance to lead them to victory. Partly in consequence of this belief, and partly as a result of the repression from which they have invariably suffered, the Shiahs have entirely dissociated the secular from the spiritual power. In Shiah countries the Church and the State are distinctly separate from each other. Though a Shiah sovereign bows to the authority of the *Mujtahids* (expounders of the law), he submits to them not so much as spiritual chiefs, but rather as counsellors whose views ought to be adopted in secular matters, as the reflex, probably,

[1] This ceremony, under the name of *Ashrai Moharram*, is now observed throughout the Shiah world.

[2] This persecution of the Shiahs finds a parallel only in that suffered by the Albigenses and the Huguenots. The stake, however, was never adopted by the "orthodox" Moslems.

of the opinions of the Invisible Leader or Imâm. Until the Saffâvian sovereigns[1] made the Shiah creed the State religion of Persia, it was the religion of a persecuted and hated sect.

The effect of this separation of the spiritual from the temporal power is most clearly marked in the doctrine of Escheats. According to the Shiahs, there is no escheat to the *Bait-ul-Mâl* (the public treasury). The idea of a *Bait-ul-Mâl* is "abhorrent" to the Shiah creed.[2] All escheats, which occur only in cases where the deceased leaves no possible heir, go to the spiritual Imâm, and in his absence (*ghibat*) to his representative (the *Mujtahid*), who distributes the proceeds among the poor of the intestate's native city.

Sub-sections of the Shiahs.

The Shiahs are divided into several sub-sections. For example, the *Asnâ Aasharias* or *Imâmias* (the followers of the twelve Imâms,)[3]

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[1] Shah Ismail Sûfî was the founder of this dynasty in the sixteenth century of the Christain era.

[2] *Jâmaa-ush-Shittât*, Book on Inheritance.

[3] Different branches of the Alides or Fatimides have ruled under the different denominations of Ameer, Imâm, Sharîf, and Caliph, in different parts of the Mussulman world, such as the Banû Ukhaydur, the Banû Mûsa, the Banû Kitadah at Mecca, the Banû Taba-Taba in Northern Yemen, the Banû Ziyâd in Southern Yemen, the Banû Idrîs in Morrocco, the Banû Fâtima (Fatimides) in Africa and Egypt. The order in which the Shiahs recognise the Imâms is as follows:—

(1) Ali (A.H. 35, A.C. 656).
(2) Hassan (A.H. 40, A.C. 660).
(3) Hussain (Shahîd-i-Kerbela, the martyr of Kerbela) (A.H. 50, A.C. 670).
(4) Ali (*Zain-ul-aâbedîn*) (A.H. 60, A C. 679).
(5) Mahommed al-Bâkir (A.H. 94, A.C. 712).
(6) Jaafar as-Sâdik (A.H. 117, A C. 734).
(7) Mûsa al-Kazim (the "Patient") (A.H. 148, A.C. 765).
(8) Ali ibn-Mûsa ar-Rezâ (A.H. 183, A.C. 799).
(9) Mohammed at-Takî (A.H. 203, A.C. 818).
(10) Ali an-Nakî (the "Pure" A.H. 220, A.C. 835).
(11) Hassan al-Askery (A.H. 254, A.C. 868).
(12) Mohammed al-Mehdy (A H. 260, A.C. 873).

This last Imâm disappeared, according to the Shiah belief, in a grotto at *Surramun-Raâ* (Sirmanrey) near Kûfa, in the twelfth year of his age. He is believed to be still alive, and they look forward with earnest anticipation to his reappearance to re-establish the universal Caliphate and to restore the purity of the human race. The Sunnis believe that he is not born yet, and that he will appear towards the close of the world with Jesus Christ. These two different views have two different bearings on the law, as is shown in the text.

the *Ismailias* (the followers of Ismail, one of the sons of Jaafar as-Sâdik, the sixth Imâm) the *Zaidias*, the *Bâtinias* (the allegorists), &c. They differ from each other not so much on the interpretation of the law as on doctrinal points. The school of the Mutazalas, regarded by Shahristâni and others as an offshoot from the Shiah branch, differs from the parent stock in essential particulars. The rise of this independent school forms one of the most interesting features in the history of Islâm. It originated in the secession of Wâsil bin Atâ, a contemporary of Abû Hanîfa, from the doctrines taught by Imâm Hassan al-Basri (of Bussorah).

The Mutazalas.

Hassan was educated in the school of the early Fatimide philosophers, and the liberality of his views was in remarkable contrast to that of his age. Wâsil imbibed knowledge at the same source, but he separated from Hassan on the question of freewill and predestination, and founded a school of his own. His disciples have, from the fact of his secession, assumed the designation of Mutazalas or *Ahl-ul-Itizâl* (Separatists or Protestants). Wâsil soon formulated the principles which constituted the basis of his difference from the other existing schools. His impulsiveness often led him to overstep the limits of moderation in his antagonism to intellectual tyranny ; yet the general rationalism which distinguished his system of philosophy and jurisprudence from every other, attracted the most advanced and cultured minds to his side. Imâm Zamakhshari (the author of the *Kashshâf*), Abul Hassan Ali al-Masûdi, "Imâm, historian, and doctor,"[1] the authors of the *Rouzat-us-Safâ* and *Habîb-us-Siyar* were all Mutazalas. There can be no doubt that the moderate Mutazalas represented the views of Ali and the most liberal and learned of his early descendants, for the doctrines of the Fatimides bear a strong analogy to those of the school founded by Wâsil and reformed by Zamakhshari.[2]

It is a well-known fact that the chief doctors of the Mutazalas were either Fatimides themselves or were educated under the Fatimides. The Mutazalas maintain that justice is the animating principle of human actions, justice being the embodiment in action of the dictates of reason. They maintain further that there is no eternal, immutable law, as regards the actions of man, and that

[1] Ibn-Khallikân.

[2] Compare the 1st Khutba of the *Nahj-ul-Balâghat*, the chapter on Freewill in the *Bihâr-ul-Anwâr* and other Shiah traditions.

the divine ordinances which regulate his conduct are the fruits of individual and collective development[1]; that, in fact, the commands and the prohibitions, "the promises and the threats," which have been promulgated among, or held out to mankind, have invariably been in consonance with the progress of humanity, and that the law has always grown with the growth of the human mind.[2] The doctrines of the *Ahl-ul-Itizâl* were adopted by Abdullâh al-Mâmûn. He and his two immediate successors attempted to introduce the Mutazalite philosophy throughout the Moslem world. Unfortunately for Islâm, orthodoxy proved too powerful even for those sovereign pontiffs, and the triumph of Patristicism under the bigot Mutawakkil led eventually to the downfall of the Caliphate.

The Indian Shiahs are chiefly *Asnâ-Aasharias* or *Imâmias*. These are divided into two sub-sections, the *Akhbâri* and the *Usûli*, namely, (1) those who adhere to certain principles of interpretation laid down by the *Mujtahids* (the jurists of their school), and (2) those who deny entirely the influence of authority on matters of opinion, unless such authority should be in harmony with the dictates of reason and judgment. The *Usûlis* allow the exercise of *Kiyâs* (private judgment) on every legal question, and, as will be seen hereafter, are, in this respect, in accord with the principal Sunni school. They approach most closely the Mutazalas in the interpretation of the law, and in their acceptance of the doctrine of evolution. The *Akhbâris* and the *Usûlis*.

In the Bombay Presidency, however, there are large numbers of Shiahs belonging to the *Ismailia* sect. They are divided into two sections called respectivly Borahs and Khojahs. Both communities appear to have been converted from Hindusim to Islâm in the early part of the 13th century by *Ismaili* missionaries called *Dâis*.[3] The Khojahs belong to the eastern subdivision of *Ismailias* and are followers of Hassan Sabâh, "the Old Man of the Mountain," whose descendant residing at Bombay still holds spiritual sway over them. The Borahs, on the other hand, belong to the western subdivision and their *Dâi-hd-Dâwât*, or Grand Prior, lives in Yemen. Khojahs and Borahs.

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[1] Shahristânî, p 30

[2] Shahristânî and Ibn Khaldûn; see the *Spirit of Islâm*, p. 613.

[3] One who invites, a Missionary; see the *Spirit of Islâm*, p. 496.

Memons. The Memons of Bombay and Cutch, a cognate community to the Borahs and Khojahs, follow the Hanafî or Shâfeï doctrines, but, like the Khojahs, on questions of succession are subject to customs, more or less Hindu in origin, which I shall discuss in its proper place.

As has already been shown, the Shiah school of law is historically anterior in date to that of the Sunnis. The founder of the Abû Hanîfa. first distinctive Sunni school was Abû Hanîfa.[1] This great jurist was born in the year 80 of the Hijra (Hegira) during the reign of Abdul Mâlik ibn-Merwân. He was educated in the Shiah school of law, and received his first instructions in jurisprudence from Imâm Jaafar as-Sâdik (the sixth Imâm of the House of Mohammed), and heard traditions from Abû Abdullah ibn-al-Mubârak and Hâmid ibn-Sulaimân. Abû Hanîfa often quotes the great Shiah Imâm as his authority. On his return to his native city of Kûfa, though he continued to remain a zealous and consistent partisan of the House of Ali, he seceded from the Shiah school of law and founded a system of his own, diverging completely in many important points from the doctrines of the Shiahs; and yet so close is the resemblance between his exposition of the law and their views, that there is no reason for doubt as to the source from which he derived his original inspiration. The latitude which he allows to private judgment in the interpretation of the law seems to be unquestionably a reflex of the opinions of the Fatimide doctors.

A proper comprehension of the teachings of Abû Hanîfa is of considerable assistance in illustrating and understanding the legal doctrines of the Shiahs. The Imâm Aazim died in the year A.H. 150. The school which he founded goes by the name of *Hanafî* and its tenets are in force among the major portion of the Indian Mussulmans,—among the Afghans, Turkomans, almost all Central Asian Mahommedans, the Turks, and the Egyptians. His school owns by far the largest number of followers. Abû Hanîfa's teachings were amplified by his disciples, Abû Yusuf and Mohammed, who have, in the estimation of many Sunnis, almost overshadowed the fame of their great master. When the disciples differ from the Imâm, their opinions are generally adopted in preference to those of the master. It is a noteworthy fact that in various questions relating to dispositions of property, testamentary as well

[1] Abû Hanîfa an-Noman ibn-Sâbit (A.C. 699-769).

as *inter vivos*, Abû Yusuf's exposition is considered of greater authority than that of the other disciples, and even occasionally than that of Abû Hanîfa himself. In the same way, in questions regarding the law of inheritance, Mohammed's views have greater weight attached to them. The founder of the second school of law among the Sunnis was (Abû Abdullah) Mâlik ibn Ans, whose tenets are in force in Northern Africa, especially in Morocco and Algeria. He died in the year A.H. 179 during the reign of Hârunar-Rashîd.[1] Mâlik.

Shâfeï[2] was the founder of the third school. He was born at Ghizah in Syria, in the same year in which Abû Hanîfa died. He died in Egypt in the year A.H. 204 (A.C. 819) during the Caliphate of Al-Mâmûn. He was a contemporary of the Shiah Imâm Ali ibn-Musâ ar-Rezâ. Shâfeï's doctrines are generally followed in Northern Africa, partially in Egypt, in Southern Arabia, and the Malayan Peninsula, and among the Mussulmans of Ceylon. In recent years his doctrines have made great progress in this country and his followers are found among all ranks of Mahommedan society. The growing sect of the *Ahl-ul-hadîs* or *Ghair-Mukallids* (non-conformists) derive their inspiration chiefly from Shâfeïsm. Shâfeï.

The fourth school was originated by Ibn Hanbal.[3] He flourished during the reigns of Al-Mâmûn and his successor, Mutassim B'illâh. These two Caliphs were Mutazalas. Ibn Hanbal's extreme fanaticism, and the persistency with which he tried to inflame the bigotry of the masses against the sovereigns, brought him into trouble with the rulers. He died in the odour of great sanctity in the year A.H. 241. Ibn Hanbal and his patristicism are responsible for the ill-success of Mâmûn in introducing the Mutazala doctrines throughout the empire, and for the frequent outbursts of persecution which deluged the Mahommedan world with the blood of Moslems. Ibn Hanbal.

Abû Hanîfa, Mâlik, Shâfeï, and Ibn Hanbal are the founders of the four orthodox schools among the Sunnis (the *Mazâhib-ul-arbaâ*). Their doctrines are essentially the same as regards the fundamental dogmas (*usûl*), though they differ from each other in the application

[1] His greatest legacy to his followers is known by the name of *Muwatta*, which treats of the oral dicta of the Prophet.

[2] *Abû Abdullah Mohammed ibn Idrîs* ash-Shâfeï.

[3] *Abû Abdullah Ahmad ash-Shaibâni al-Marwâri* ibn-Hanbal (shortly Ahmad ibn Hanbal).

of private judgment and in the interpretation and exposition of the Koran.

Shâfeï, Mâlik, and Ibn Hanbal almost entirely exclude the exercise of private judgment in the exposition of legal principles. They are wholly governed by the force of precedents. They do not admit the validity of a recourse to analogical deductions, or of such an interpretation of the law whereby its spirit is adapted to the special circumstances of any particular case. Their followers are accordingly designated *Ahl-ul-hadîs* (traditionists *par excellence*).[1]

The exercise of private judgment, consecrated by the Prophet and adhered to strictly by his immediate descendants, had induced the development of a liberal spirit among the Fatimides; and this had its legitimate influence on the mind of Abû Hanîfa. The value which he and his disciples attach to the exercise of Kiyâs is proved by a series of passages given in the *Fatâwa Alamgiri*.[2] The followers of Abû Hanîfa are styled *Ahl-ur-Rai wa'l Kiyâs* (people of judgment and reason).

Position of women in Islâm.

The reforms instituted by Mohammed effected a vast and marked improvement in the position of women. Both among the Arabs and the Jews who inhabited the peninsula of Arabia the condition of women was extremely degraded. The Hebrew maiden, even in her father's house, stood in the position of a servant[3]; her father could sell her if a minor. He, and after his death his son, disposed of her at their will and pleasure. The daughter inherited nothing except in the extremest case.[4] Among the pagan Arabs a woman was considered a mere chattel; she formed an integral part of the estate of her husband or her father; and the widows of a man descended to his son or sons by right of inheritance, as any other

[1] Shahristânï; Ibn Khaldûn.

[2] In p. 383 of the third volume occurs a passage taken from the *Muhît*, which is worth quoting. It says: "If the concurrent opinion of the Apostolic Companions should not be forthcoming, but there should be a concordance among their contemporaries, the Kâzi should follow the principles observed by the latter; should there be, however, a difference among the *Tâbiûn* (contemporaries), the Judge should compare their arguments and adopt the judgment he deems preferable." Other passages of the like import are contained in the same volume, which place the doctrines of the Hanifite school in the clearest light possible.

[3] Numbers xxx, 17.

[4] Dollinger, *The Gentile and the Jew*. Vol. II. p 341

portion of his patrimony. Hence the frequent unions between stepsons and mothers-in-law, which, when subsequently forbidden by Islâm, were branded under the name of *Nikâh-al-Makt* ("shameful or odious marriages").

Female infanticide among the ancient Arabs.

The pre-Islâmite Arabs carried their aversion to women so far as to destroy, by burying alive many of their female children. This fearful custom, which was most prevalent among the tribes of Koreish and Kendah, was denounced in burning terms by Mohammed, and was prohibited under severe penalties, along with the inhuman practice which they, in common with other nations of antiquity, observed of sacrificing children to their gods.[1]

The status of women in Islâm.

Under the Islâmic laws, as will be shown in detail hereafter, a woman occupies a superior legal position to that of her English sister. As long as she is unmarried, she remains under the parental roof, and until she attains her majority she is, to some extent, under the control of the father or his representative. As soon, however, as she is of age, the law vests in her all the rights which belong to her as an independent human being. She is entitled to share in the inheritance of her parents along with her brothers, and though the proportion is different, the distinction is founded on a just comprehension of the relative circumstances of brother and sister. On her marriage she does not lose her individuality. She does not cease to be a separate member of society, and her existence does not "merge" in that of her husband. No doctrine of "coverture" is recognised; and her property remains hers in her individual right. She can sue her debtors in the open Courts, without the necessity of joining a next friend or under cover of her husband's name. She continues to exercise, after she has passed from her father's house into her husband's home, all the rights which the law gives to men. All the privileges which belong to her as a woman and a wife are secured to her not by the courtesies that "come and go," but by the actual text in the book of law. She can alienate or devise her property without asking the leave of her husband. She can act as an administratrix or executrix, or be appointed a *Mutwallièh* (governor of a charitable endowment).

A Moslem marriage.

A Moslem marriage is a civil act, needing no mollah, requiring no sacred rite. The contract of marriage gives the man no power

[1] See Koran, chaps. vi, xvi, xvii, and lxxxj.

over the woman's person beyond what the law defines, and none whatever upon her goods and property. A Mussulman wife retains in her husband's household all the rights which the law vests in her as a responsible member of society. She can be sued as a *femme sole*. She can receive property without the intervention of trustees. She has a distinct lien upon her husband's estate for her antenuptial settlement. Her rights as a mother do not depend for their recognition upon the idiosyncracies of individual judges. She can enter into binding contracts with her husband, and proceed against him in law if necessary. Her earnings acquired by her individual exertions cannot be wasted by a prodigal husband, nor can she be ill-treated with impunity by one who is brutal.

"Of course," as says a recent writer, "there may be secret tyrannies in Asia, as there may be in America . . . but the excesses of a Moslem husband find no sanction either in the silence or in the provisions of the actual Code. If he does wrong, he does it as wrong, and with the fear of punishment in his heart. When a man commits an abuse of the harem, however trifling, he knows that for the victim of his temper there is a swift and sure appeal to an impartial judge."[1] "Our common law," says the same writer, "gives up the wife so thoroughly into her husband's power, that a woman who comes to the altar young, confiding, beautiful, and rich, may be compelled by brutal treatment, for which the law gives her no redress, to quit it, after a dozen years, an outraged woman with a ruined fortune and a wasted frame." The whole history of Mahommedan legislation is a standing rebuke to those who consider that the position of women under the Islâmic laws is one of exceptional severity and degradation.

Polygamy common among various races.

"Among all Eastern nations of antiquity polygamy was a recognised institution. Its practice by royalty, which everywhere bore the insignia of divinity, sanctified its observance to the people."[2] Among the Hindus, polygamy, in both its aspects, prevailed from the earliest times. There was, apparently, as among the ancient Medes, Babylonians, Assyrians, and Persians, no restriction as to the number of wives a man might have. A high-caste Brahmin even in modern times is privileged to marry as many wives as he

[1] Hepworth Dixon's "*New America*."

[2] *The Spirit of Islâm*, p. 316.

chooses. Polygamy existed among the Israelites before the time of Moses, who continued the institution without imposing any limit on the number of marriages which a Hebrew husband might contract. In later times the Talmud of Jerusalem restricted the number by the ability of the husband to maintain the wives properly;[1] and though the Rabbins counselled that a man should not take more than four wives, the Karaites differed from them and did not recognise the validity of any limitation.

Among the Athenians, the most civilised and most cultured of all the nations of antiquity, the wife was a mere chattel, marketable and transferable to others, and a subject of testamentary disposition. She was regarded in the light of an evil, indispensable for the ordering of the household and procreation of children. An Athenian was allowed to have any number of wives, and Demosthenes gloried in the possession by his people of three classes of women, two of which furnished the legal and semi-legal wives.[2]

Among the Romans, also, polygamy flourished in a more or less pronounced form until forbidden by the laws of Justinian.[3] But the prohibition contained in the Civil Law effected no change in the moral ideas of the people, and polygamy continued to be practised until condemned by the opinion of modern society. The wives, with the exception of the one first married, laboured under severe disabilities. Without rights, without any of the safeguards which law threw around the favoured first one, they were the slaves of every caprice and whim of their husbands. Their children were stigmatised as bastards, precluded from all share in the inheritance of their father, and treated as outcasts from society.

Morganatic and left-handed marriages were not confined to the aristocracy. Even the clergy, frequently forgetting their vows of celibacy, contracted more than one legal or illegal union. History proves conclusively that until very recent times polygamy was not considered so reprehensible as it is now. St. Augustine himself seems to have observed in it no intrinsic immorality or sinfulness, and declared that polygamy was not a crime where it was the legal institution of a country. The German reformers, as Hallam points

[1] Eben Haezer, *Code Rabbinique*, Vol. I, p. 45.

[2] Döllinger, *The Gentile and the Jew*, Vol. II, pp. 233—238. Comp. also *Encyclopedie Universelle*, Art. Mariage.

[3] Gibbon, *Decline and Fall of the Roman Empire*, Vol. IV, p. 206.

out, even so late as the sixteenth century admitted the validity of a second or a third marriage contemporaneously with the first, in default of issue and other similar causes.

Among the ancient Arabs and the Jews, there existed, besides the system of plurality of wives, the custom of entering into conditional, as well as temporary, contracts of marriage. These loose notions of morality exercised the most disastrous influence on the constitution of society within the Peninsula. Beyond the boundaries of Arabia the condition of morals was no less lax. In the Persian and the Byzantine empires, women occupied the most degraded position in the social scale. Fanatical enthusiasts, whom Christendom in later times canonised as saints, preached against them and denounced their enormities, forgetting that the evils they perceived in women were the reflections of their own jaundiced minds. It was at this time, when the social fabric was falling to pieces on all sides, when all that had hitherto kept it together was giving way, when the cry had gone forth that all the older systems had been weighed in the scale of experience and found wanting, that Mohammed introduced his reforms.

Mohammed enforced as one of the essential teachings of his creed "Respect for women." And his followers, in their admiration of the virtues of his celebrated daughter, proclaimed her "the Lady of Paradise,"[1] as the representative of her sex. In the laws which the Arabian Prophet promulgated he strictly prohibited the custom of conditional marriages, and though at first temporary marriages were tacitly allowed, in the third year of the Hijra even these were forbidden. Mohammed secured to women, in his system, rights which they had not before possessed: he allowed them privileges the value of which will be more fully appreciated as time advances. He placed them on a footing of perfect equality with men in the exercise of all legal powers and functions.[2] He restrained polygamy by limiting the maximum number of contemporaneous marriages and *by making absolute equity towards all, obligatory on the man*. It is worthy of note that the clause in the Koran[3] which

Practically forbidden by Mohammed.

[1] *Khâtûn-i-jinnat.*

[2] The ancient Arabs did not allow women, and it is also said infant children—in fact, those who could not take part in the tribal wars—to share in the inheritance of their husbands and parents.

[3] Koran, chap. iv, v, 3.

contains the permission to contract four contemporaneous marriages, is immediately followed by a sentence which cuts down the significance of the preceding passage to its normal and legitimate dimensions. The former passage says: "You *may* marry two, three, or four wives, but not more." The subsequent lines declare, "but if you cannot deal equitably and justly with all you *shall* marry only one." The extreme importance of this proviso, bearing especially in mind the meaning which is attached to the word "equity" (*adl*) in the Koranic teachings, has not been lost sight of by the great thinkers of the Moslem world. Even so early as the third century of the era of the Hijra, during the reign of Al-Mâmûn, the first Mutazalite doctors taught that the developed Koranic laws inculcated monogamy. And though the cruel persecutions of the mad bigot, Mutawwakil, prevented the general diffusion of their teachings, the conviction is gradually forcing itself on all sides, in all advanced Moslem communities, that polygamy is as much opposed to the Islâmic laws as it is to the general progress of civilised society and true culture. In consequence of this conviction, a large and growing section of Islâmists regard the practice of polygamy as positively unlawful; and this is particularly the case among the Mutazalas. Even among those Moslems who do not belong to this sect, especially in India, this idea is becoming a strong moral, if not a religious factor, and many extraneous circumstances in combination with this growing feeling are tending to root out the existence of polygamy from among the Mussulmans. A custom has grown up in this country, which is largely followed by all classes of the community, of drawing up a marriage-deed containing a formal renunciation on the part of the future husband of any right or semblance of right which he might possess or claim to possess to contract a second marriage during the existence of the first. This custom serves as a most efficacious check upon the growth and the perpetuation of the institution of polygamy. In India more than ninety-five per cent. of Mahommedans are at the present moment, either by conviction or necessity, monogamists. Among the educated classes, versed in the history of their ancestors and able to compare it with the records of other nations, the custom is regarded with disapprobation amounting almost to disgust. In Persia, according to Colonel Macgregor's statement, only two per cent. of the population enjoy the questionable luxury of plurality of wives It is

Monogamy in Islâm.

earnestly to be hoped that before long all sections of Moslems will come to recognise that polygamy, like slavery, is abhorrent to the laws of Islâm.

It cannot be denied that several institutions which the Mussulmans borrowed from the pre-Islâmic period, "the Days of Ignorance," and which exist simply as so many survivals of an older growth, have had the tendency of retarding the advancement of Mahommedan nations. Among them the system of the seclusion of females is one. It had been in practice among most of the nations of antiquity from the earliest times. Even the Athenians seem to have observed the custom in all its strictness. The system possesses many advantages in the social well-being of unsettled and uncultured communities. Mohammed found it existing among his contemporaries; he perceived the advantages, and he accordingly recommended its observance to his followers. Whether he intended it to acquire the character of a moral law or to attain its present inelastic form, is a question which it is impossible to answer directly.[1] And yet it is a mistake to suppose there is anything in the law which tends to the perpetuation of the custom. Considerable light is thrown on the Lawgiver's recommendation for female privacy, by the remarkable immunity from restraint or seclusion which the members of his family always enjoyed.[2] The depravity of morals which had sapped the foundations of society among the pre-Islâmite Arabs as well as among the Jews and the Christians, urgently needed some correction. The Prophet's counsel regarding the privacy of women served undoubtedly to stem the tide of immorality and to prevent the diffusion among his followers of the custom of disguised polyandry which had evidently, until then, existed among the pagan Arabs.

Seclusion of women.

The *harem*, according to Von Hammer,[3] is the sanctuary of

[1] See the *Spirit of Islâm*.

[2] Ayesha, the daughter of Abû Bakr, who was married to Mohammed on Khadîja's death, personally conducted the insurrectionary movement against Ali. She commanded her own troops at the famous "Battle of the Camel." Fâtima, the daughter of the Prophet, often took part in the discussions regarding the succession to the Caliphate. The grand-daughter of Mohammed, Zainab, the sister of Hussain, shielded her youthful nephew from the Ommeyyades after the butchery of Kerbela. Her indomitable spirit awed equally the ferocious Obaidullah ibn Ziyâd and the pitiless Yezid.

[3] *Hist. de l'Empire Ottoman*, Vol. III, p. 213.

conjugal happiness. It is prohibited to strangers, not because women are considered unworthy of confidence, but on account of the sacredness with which custom and manners invest them. "The degree of reverence which is accorded to women throughout Higher Asia and Europe (among Mahommedan communities) is a matter capable of the clearest demonstration. In order, however, to regulate the intimate relationship of the husband and wife, they have instituted the custom of seclusion, which cannot be invaded even by him. The Arabic word *harem*, erroneously construed by Europeans to mean 'the imprisonment of women,' signifies 'the women's apartment'; and the Odalisques among the Turks resemble the *demoiselles de compagnie* among the Germans." Within the sacred precincts of the *zenana* or *anderoon* (as it is called in Persia[1]) the wife reigns supreme. The husband has no authority within that circle, and frequently he cannot enter it without her permission. I shall point out in detail later on, the safeguards by which the wife is surrounded by the law. Here I shall do no more than simply call attention to her present social position. Taken as a whole, her condition is not more unfavourable than that of many European women. Her comparatively backward condition is the result of want of culture among the community generally rather than of any especial feature in the Islâmic laws or institutions. Her legal status is decidedly superior to that of European women.[2] The social immunities she enjoys allow the fullest exercise on her part of the powers and privileges which the law gives to her. She acts, if *sui juris*, in all matters which relate to herself and to her own property, in her own individual right without the intervention of husband or father. She appoints her own attorney, and delegates to him all the powers she herself possesses. She enters into valid contracts with her husband and her male relations on a footing of equality. If she is ill-treated she has a right to have the marriage-tie dissolved. She is entitled to pledge the credit of her husband for the maintenance of herself and her children. She is able, even if holding a creed different to that of her husband, to claim the free and unfettered exercise of her own religious observances. If the husband is

[1] The *Haraylik* in Turkey.

[2] See the article on the *Real Status of Women in Islâm*, in the *Nineteenth Century* for September 1891; and the *Spirit of Islâm*, p. 361.

possessed of means, he is bound to place at his non-Moslem wife's disposal some conveyance to take her to her usual place of worship. He is debarred from molesting her in the smallest degree in the exercise of her faith ; whilst, like a Moslem mother, she is entitled to the custody of her children. Her antenuptial settlement is her own by absolute right, and she can deal with it according to her own will and pleasure. To become entitled to its enjoyment she requires no intermediaries, trustees, or next friends. When she is aggrieved by her husband, she has a right to sue him in her individual capacity. Her claim for her antenuptial settlement in the estate of her husband has priority over all unsecured debts, and she ranks in *pari passu* with secured creditors.

Whilst the girl is a minor, the father has the right of entering into a contract of marriage for her, as in the case of his male child ; but this power, as will be subsequently shown, is restrained by the right of objection possessed by the guardian next in order to the father, in case of fraud or a likelihood of prejudice to the interests of the child. If a minor be contracted in marriage by any guardian other than the father, he or she has an absolute and unqualified option either to ratify or dissolve the contract on attaining majority. A woman, who is *sui juris*, can, under no circumstance, be married without her own express consent. No marriage is valid without an antenuptial settlement by the husband in favour of the wife ; in fact, an antenuptial settlement is a condition precedent to the validity of a marriage, whether the wife be a Moslem or a non-Moslem. Among the Romans the wife was required to bring a dowry, and the custom has been adopted by many Western nations in a modified form. Among the Mussulmans in India it exists in the shape of *Jahêz*, articles of value or utility, ornaments or household utensils, which the bride's parents send with her, but which remain exclusively as her *peculium*. Sometimes the *Jahêz* (or *Jahâz*) consists of money or securities.

In India, antenuptial settlements are very large, often far beyond the means of the individual to liquidate, the object being to prevent the possibility of a divorce on the part of the husband. As the Mahommedan Law regards marriage in the light of a civil contract, it gives to the married parties, under certain circumstances, the right of dissolving the contract. In those cases where the divorce proceeds from the husband, or from some line of

conduct on his part, he has to pay down the entire sum settled on the wife, before he can legally dissolve the marriage. According to a large section, however, this right can only be effectuated by a formal order of the Judge (*Hâkim-ush-Sharaa*).

Ill-treatment of the wife is strictly prohibited, and where she is habitually ill-treated, she has the right of obtaining a divorce. So, likewise, in the case of desertion or non-maintenance. In case of discord and disagreement arising between the married parties, the *Hâkim-ush-Sharaa* either appoints some respectable females, or proceeds himself, to effect a reconciliation. When the disagreement, arising from incompatibility of temper or any other cause, continues, and all efforts to bring about a compromise prove unavailing, then only may the parties proceed to dissolve the contract by *talâk* or *khulâ* or *mubârât*. When the cause of disagreement arises from the conduct of the husband, when he is the principal offender, or when he alone wishes for a divorce, he is bound to liquidate the unpaid portion of the settlement-debt, and as in India these sums are so large as to be absolutely prohibitory, the power of obtaining a divorce *suo motu* possessed by a husband is virtually *nil*. When the discord originates with the wife, or when she herself is anxious to obtain a divorce without any justifiable cause, she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage. The wife thus occupies a decidedly more advantageous position than the husband.[1] Divorce.

The limitations imposed on the right of divorce will be treated of in detail in the text. It will, however, not be out of place here to mention that the Mutazalas differ from the principal schools with regard to the conditions under which a valid divorce may be effected. The essential point of difference consists in the fact that, according to this school, the order of a Judge is in every case necessary to constitute a legal separation. A divorce, therefore, proceeding either from the husband or the wife, is held to be invalid until confirmed by or effected in the presence of the *Hâkim-ush-Sharaa*, with his sanction and approval; for, according to the Mutazalas, it is contrary to all the principles of public policy to allow man or woman to dissolve the marriage-tie at their own free will and desire.

[1] I am speaking here of those who do not consider it necessary to have recourse to the Judge.

The Mutazalas, besides, differ from the other schools in insisting that a repudiation or *talâk* initiated by the husband should be founded on some justifiable cause and should not proceed simply from caprice; and that the *Hâkim-ush-Sharaa* should declare, on the failure of all attempts to reconcile the parties, the cause to be reasonable and proper. These limitations largely curtail the powers which the law, as construed by some of the principal schools, reserves to the husband as well as the wife to dissolve the contract on the occurrence of any contingency that makes the marriage-tie irksome.

Divorce is never resorted to among the upper classes of Mussulmans in India, and even in the lower strata of society, it is so rare as to be inappreciable in its influence on public morality. Two causes, presumably, have led to this result. Among the higher ranks, considerations of family honour act as the deterrent motive; whilst the poorer and more ignorant portions of the community are restrained by the pecuniary penalty which is attached to divorce. In other Moslem countries, where the sentiment of family honour is not so strong, and the pecuniary penalty not so heavy as in India, the restraining influence is due to another provision in the law which is recognised by the Sunnis and the Shiahs, but discarded by the Mutazalas. According to the Rabbinical Code, the husband who once divorced his wife could under no possible circumstance re-marry her. The Sunnis, as well as the Shiahs, allow a re-marriage, subject to the condition that the divorcée should go through the marital ceremony with another husband and be divorced from him. This peculiar condition, though not recognised by the Mutazalas, has the effect of preventing the promiscuous and unrestrained practice of divorce among uncultured races, by appealing to the instinct of jealousy—probably the only feeling which influences semi-civilised communities.

Slavery among the ancients.

Slavery, in some of its features, has been aptly compared to polygamy. Like polygamy, it has existed among all nations, and has died away with the progress of human thought and the growth of a sense of justice among mankind. The practice of slavery is coeval with human existence. Historically, its traces are visible in every age and among every nation of which we have any positive information. Its germs were developed in the savage state of society, and slavery continued to flourish even when the advance-

ment of ideas and growth of material civilisation had done away with its apparent necessity. The Jews, the Greeks, the Romans, and the ancient Germans—people whose legal and social institutions have most affected modern ideas and modern manners and customs—recognised and practised both kinds of slavery, prædial servitude as well as household slavery. Among the Hebrews the lot of non-Israelite bondsmen and bondswomen was one of unmitigated hardship. 'Helots of the soil, or slaves of the house, hated and despised at the same time, they lived a life of perpetual drudgery in the service of pitiless masters.'

The later Roman Law took from the masters the power of inflicting capital and other severe punishments on their slaves, which the archaic rules of the Twelve Tables had conferred on them. The Digest, however, compiled under a Christian emperor, pronounced slavery a constitution of the law of nature, and the Code fixed the maximum price of slaves according to the professions for which they were intended. Among the pre-Islâmic Arabs, all captives of war were either reduced to slavery or put to the sword. The Koranic legislation abolished the custom of massacring prisoners of war, and allowed them to be retained in bondage until ransomed. It recognised, in fact, only one kind of slavery, the servitude of men made captives in *bona fide* lawful warfare, *Jehâd-i-Shara'i*. The Koran always speaks of slaves as "those whomsoever your right hands have acquired."

Mohammed, according to a tradition from Imâm Jaafar as-Sâdik declared the man who dealt in slaves as the outcast of humanity. Slave-lifting and slave-dealing he utterly reprobated and condemned. The enfranchisement of slaves was pronounced to be the highest act of virtue. It was forbidden in absolute terms to reduce Moslems to slavery. The masters were forbidden to exact more work than was just and proper. They were enjoined to clothe their bondsmen and bondswomen, taken in legal warfare, to feed and lodge them as friends and guests, without any regard to their position. Above all, it was ordered that "in no case should the mother be separated from her child," "nor brother from brother," "nor father from son," "nor husband from wife," "nor one relative from another." The possession of a slave by the Koranic laws was conditional on a *bona fide* war, waged in self-defence, against idolatrous enemies; and it was permitted in order to serve as a guarantee for the

preservation of the lives of the captives. Among uncivilised races, with whom the struggle for existence is accentuated by the scantiness of food, prisoners of war are spared with the object of profiting by their labours. Mohammed found the custom existing among the pagan Arabs ; he minimised the evil, and at the same time laid down such strict rules that but for the perversity of his followers, slavery as a social institution would have ceased to exist with the discontinuance of the wars in which the Moslem community was at first involved.

The mutilation of the human body was also explicitly forbidden by Mohammed, and the institution which flourished both in the Persian and the Byzantine empires was denounced in severe terms. Slavery by purchase was unknown during the reigns of the first four Caliphs, the *Khulafâi-râshidîn*, "the legitimate Caliphs" as they are called by the Sunnis. There is, at least, no authentic record of any slave having been acquired by purchase during their tenure of the office. But with the accession of the usurping House of Ommeyya, a change came over the spirit of Islâm. Muâwiyah was the first Mussulman sovereign who introduced into the Mahommedan world the practice of acquiring slaves by purchase. He was also the first to adopt the Byzantine custom of guarding his women by eunuchs. During the reigns of the early Abbassides the Shiah Imâm Jaafar as-Sâdik preached against slavery, and his views were adopted by the Mutazala. Karmath, who flourished in the ninth century of the Christian era,[1] and whose name has become infamous among the orthodox section of the Moslems, was a Bâtinia, who held that the religion of Mohammed, like the ancient faiths, had two significations, one esoteric, the other exoteric.[2] He, too, seems to have held slavery to be unlawful. His violent denunciations against domestic slavery partly led to his being placed under the ban by a great majority of Mussulmans.

An introduction to a treatise on the Personal Law of the Mahommedans will not be complete unless attention is briefly drawn to the disqualifications which exclude individuals from the enjoyment of certain civil rights. These disqualifications are primarily political in their nature.

Difference of religion, or what would be called in Mussulman legal treatises, infidelity, implied in early times unqualified hostility

[1] A.C. 890, A.H., 277. [2] p. 147 (Cureton's Edition).

to the Commonwealth of Islâm, and apostasy was tantamount to treason. Accordingly, the Sunnis and the Shiahs agree in excluding the non-Moslem, as well as the person who has abjured the Mussulman faith, from the right of succession to the inheritance of Mussulman relations, on the ground that by so doing they keep out hostile and treasonable elements from the Mahommedan body politic.

The Indian Act XXI of 1850 has removed the impediment to succession which the Mussulman Law imposed on the persons who abjured Islâm. But it leaves untouched the disqualification which the Mahommedans attach to original infidelity.

Difference of temporal allegiance, when the states are not in amity with each other, also forms a disqualification according to the Sunnis, though the Shiahs seem to differ on this point. Slavery and homicide also constitute causes which exclude a person from the exercise of civil rights.

PART I.

THE LAW RELATING TO SUCCESSION.

CHAPTER I.

GENERAL OBSERVATIONS.

In the Islâmic system the different schools and sub-schools are so intimately connected with the different persuasions, sects or communions to which they appertain, that when a person belonging to one communion or sect or sub-sect goes over to another, his status and the dispositions made by him, as well as the succession to his inheritance, are thence forward governed by the rules of the school to which he now belongs. For example, a Shiah on adopting the Sunni persuasion would subject himself to the Sunni Law.

So a Hanafî becoming a Shâfeïte, or an Akhbâri becoming an Usûli would be governed by the Shâfeï or Usûli principles as the case may be, and *vice versâ*. From this point of view it may be said that the entire Mussulman Law is a personal law.

Distinction between the Shiahs and the Sunnis.

One great outward distinction between the Shiahs and the Sunnis is, that whilst the former pray with their hands held straight down by their side, the latter offer their prayers with hands folded in front. Between the Hanafîs and the Shâfeïs, it consists in the former pronouncing the word *âmîn* (amen) in a low voice in their prayers, whilst the latter pronounce it loudly.

In the Mahommedan Law there is no distinction between ancestral and self-acquired property. The owner for the time being has absolute dominion over all property in his possession, whether he has acquired it himself, or whether it has devolved upon him by inheritance. He can sell or dispose of it in any way he likes provided operation is given to it during his lifetime. It is only with regard to dispositions intended to take effect after the donor's death that his power of disposition is limited by the right of his heirs. He cannot by a testamentary disposition reduce or enlarge the

Limitation on the testamen-

tary powers of a Mahommedan.

shares of those who by law are entitled to inherit. This principle was recognised by the Privy Council in the case of *Ranee Khujoorunnissa* v. *Mussamut Roushan Jehan*,[1] though it was laid down rather too broadly, the consequence of which has been to give rise to considerable misapprehension regarding the general policy of the Mahommedan Law. In that case, it appeared that one Rajah Deedar Hossain, who died in 1841, possessed of large zemindaries, and leaving a number of heirs had executed, prior to his death, two instruments on epurporting to be a deed of gift in respect of certain properties, the other a will in respect of the residue of his estate in favour of his eldest son, Enayet Hossain, under which the latter took possession of the entire estate of his father. The latter instrument ran as follows :—

Ranee Khajoorunnissa v. *Mussamut RoushunJehan.*

"I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for my, the testator's, welfare hereafter, by charity, and pilgrimage, and keep up the family usage, namely, the expenses of the mosque, and tazeeadaree of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself, the executor. From the other two-thirds after paying off all the debts of my creditors, giving allowances as per shares to the executor himself, and my sons, daughters, and wives, the right-holders, and salary-holders, that is, friends and servants, repairs of houses and court, expenses, &c., including other necessaries as below detailed without diminution and increase ; he shall keep every one by his good conduct and affection contented and satisfied." Upon a suit by one of the others heirs of Deedar Hossain, two principal questions came up for decision before the Privy Council, (1) the validity of the gift, and (2) that of the will. On these two points their Lordships expressed themselves in the following terms :—

"The policy of the Mahommedan Law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat

[1] L. R., 2 I. A., 192.

the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Mahommedan Law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah Deedar Hossein of this deed giving one-third to his son Enayet on the 10th of November 1839. The deed was either, to use English expressions, a deed of gift simply, or a deed of gift for a consideration.

"If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery or, in other words, by what is termed in the books a seisin on the part of the donee. In their Lordship's judgment there was no delivery of this kind. Even assuming that, although the estate was under attachment, a sufficient seisin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. Perry, which is treated as trustworthy on both sides, that in point of fact Rajah Deedar Hossain remained in receipt of the rents and profits of the property until his death. Therefore, if the deed were a mere deed of gift, there was not that delivery of possession which was necessary to give it effect by Mahommedan Law. A question which was touched upon, though not much argued, *viz.*, whether the doctrine of Mahommedan Law relating to 'confusion of gifts' applied, appears not to rise, as there was no delivery of possession.

"But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was not necessary. It was, however, conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, *viz.*, an actual payment of the consideration on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *bona fide* paid."

It is submitted that the view expressed with regard to the will does not appear to be in accord with the Mahommedan Law. Under the Shiah Law to which the parties were subject, Deedar Hossain had an incontestable right to leave by will *one-third* for the purposes described by him, and to leave by way of remuneration to the executor the balance of the income after the performance of the religious ceremonies. But the opinion regarding the will was probably influenced by the result of the conclusions arrived at in respect of the gift which, if no consideration had passed and transmutation of possession in some shape had not been effected, would no doubt be bad. But this decision must be confined to the special facts of that case, for it in no way affects the general provisions of the Mahommedan Law, by which the proprietor of an estate may, during his lifetime, with the consent, express or implied, of the members of his family, make an arrangement by which one of such members should become the manager and head of the family, the others retaining an interest in the usufruct in proportion to their respective shares. Such a family arrangement is no evasion of the Mahommedan Law, nor is it opposed to its rules. It will be binding upon the members of the family.

The restriction referred to on the testamentary powers of a Mussulman, which is not without analogy in some of the Western systems, leads to the consequence, that as far as the major portion of the estate and effects of a deceased propositus is concerned, the distribution takes place as if he had died intestate.

So far as succession is concerned, there is no distinction between real and personal property, excepting in the case of a childless widow under the Shiah Law.[1]

No presumption of jointness.

Among the Mahommedans there is no presumption of jointness. When the members of a Mahommedan family live in commensality, they do not necessarily form a "joint family" in the sense in which that expression is used with regard to Hindus; and, in Mahommedan Law there is not, as there is in Hindu Law, any presumption that the acquisitions of the several members are made for the benefit of the family.[2]

In some parts of India, however, Mahommedan families have adopted the Hindu joint family system. In many instances Hindu

[1] *Mussamut Umdutoonnissa* v. *Musst. Asloo*, 20 W. R., 297.

[2] *Hakim Khan* v. *Gool Khan*, I. L. R., 8 Cal., 831.

families converted to Islâm have adhered to the old customs and continued to live jointly. In such cases the legal rights of the parties have been held to be subject to the same principles as are applicable to members of a Hindu joint family. But the onus of establishing the custom as always existing in the family is strictly on the party alleging it.

In the case of *Jowala Buksh* v. *Dharam Sing*,[1] their Lordships of the Judicial Committee made certain observations in connection with the law governing succession among Hindu families converted to Mahommedanism, which require notice. Their Lordships said as follows :— *Jowala Bukhsh v. Dharam Sing.*

"The case has hitherto been treated upon the assumption, which the plaintiffs seem to have made part of their case, that this family, though converted to Mahommedanism, is to be taken as still conforming to the Hindu laws and usages, and that, consequently, the questions of title raised in this cause are to be governed by Hindu Law. Their Lordships, however, are far from admitting the correctness of that assumption.

"This case is distinguishable from that of *Abraham* v. *Abraham*.[2] There the parties were Native Christians, not having as such any law of inheritance defined by Statute ; and, in the absence of one, this Committee applied the law by which as the evidence proved, the particular family intended to be governed. But the written law of India has prescribed broadly that in questions of succession and inheritance, the Hindu Law is to be applied to Hindus, and the Mahommedan Law to Mahommedans ; and in the judgment delivered by Lord Kingsdown, in *Abraham* v. *Abraham*, it is said, that 'this rule must be understood to refer to Hindus and Mahommedans, not by birth merely but by religion also.'

"The two cases in W. H. Macnaghten's 'Principles of Hindu Law,' Vol. II., pp. 131, 132, which deal with the case of converts from the Hindu to the Mahommedan faith, and rule that the heirs according to Hindu Law will take all the property which the deceased had at the time of his conversion, are also authorities for the proposition that the devolution of his subsequently acquired property is to be governed by the Mahommedan Law. Here there is nothing to show conclusively when or how the property was

[1] 10 Moo. I. A., 536. [2] 9 Moo. I. A., 195.

acquired by the great ancestor. There was no conflict, as in the cases just referred to, between Hindus and Mahommedans touching the succession to him.

"Whatever he had is admitted to have passed to his descendants, of whom all, like himself, were Mahommedans; and it seems to be contrary to principle that, as between them, the succession should be governed by any but Mahommedan Law. Whether it is competent for a family converted from the Hindu to the Mahommedan faith to retain for several generations Hindu usages and customs, and by virtue of that relation to set up for itself a special and customary law of inheritance, is a question which, so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide that question in the negative, and their Lordships abstain from doing so. They must, however, observe that to control the general law, if, indeed, the Mahommedan Law admits of such control, much stronger proof of special usage would be required than has been given in this case."

The dictum of the High Court in the case of *Rup Lal Chowdhry* v. *Latu Lal Chowdhry*[1] that the Hindu Law is applicable to Hindu converts to Islâm is against authority and has been dissented from in *Hakim Khan* v. *Gool Khan*.[2]

The Indian Law Courts have, to a certain extent, regarded the old customs retained by families converted from Hinduism to Islâm as inflexible, admitting of no alteration or variation. But this again is contrary to the personal law of the parties and, certainly opposed to the opinion of the Judicial Committee. In the case of *Abraham* v. *Abraham*,[3] their Lordships made the following pregnant observations:—

Abraham v. *Abraham.*

"Now, Matthew Abraham acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown, as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves could be of compulsory obligation on a descendant of theirs acquiring his own wealth. If a Hindu in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, *à fortiori*, a Christian may do the same.

[1] 3 Cal. L. R., 97. [2] I. L., 8 Cal., 831. [3] 9 Moo. I. A., 195.

"Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. It was well observed by Mr. Melvill, that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings, and obligations of successive generations of men?

"If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or interest? Surely in things indifferent in themselves, the Tribunals, which have a discretion and have no positive *lex fori* imposed on them, should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

"The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicile. The *argumentum ab inconvenienti* cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing in law? Their Lordships are of opinion, that it was competent to Matthew Abraham, though himself both by origin and actually in his youth a 'Native Christian,' following the Hindu laws and customs on matters relating to property, to change his class of Christian and become of the Christian class to which his wife belonged.

"This was no light and inconsiderate step taken up on a whim, and to be as lightly laid aside. We find in the evidence that there was on one side an exhibition of preliminary caution. The change was deliberate, it was publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the

undivided family union in the sense before mentioned is unknown. How, then, can it be imposed on that family of which Matthew Abraham formed the head as father? Not by consent, for there was none; not by force of obligatory law, for there was none; not by adoption, for they had not adopted any Hindu customs, but, on the contrary, had rejected them all.

"It could only be imposed, as it seems to their Lordships, by passing over the actual family springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members, by passing over all actual usages, customs, and ways of living; and by supposing contrary to fact the prevalence of Hindu customs, which had been deliberately abandoned. Their Lordships, therefore, are of opinion that the undivided family on which the defendant relies in his answer did not exist in any sense which is material to, or assists the decision of, the case."

Alimunessa Khatoon v. *Hasan Ali.*

In the case of *Alimunessa Khatoon* v. *Hasan Ali*, the Calcutta High Court held that, even when certain Mahommedans have been living jointly, and expenses have been incurred for the benefit of any particular member, the burden of such expenses will not be thrown on the other members of the joint family. In that case it appeared that the plaintiff and defendant, brother and sister, were living joint in food and estate until 1872, when they separated. At the time of separation, they entered into an agreement to the following effect:—

"If claims relating to the joint estate are brought on the ground that they are debts due on account of the time we were joint and living in commensality, then I, A and I, B will pay such claims, according to what is just in equal shares. If either of us do not pay and one of us shall pay the share of the other, then the person who has paid shall recover from the other the amount he has paid for the other."

After the separation a decree was obtained against the brother for the price of certain clothes supplied to him for his marriage, which took place while they were joint, and he having paid the amount of this decree sued the sister for one-half of the amount so paid. It was held that, as the debt was not incurred in a matter necessary to the existence of the family, but for the individual benefit of the brother, and that as in a Mahommedan family the individual

benefited, and not the family, is liable for expenses incurred for the benefit of any particular member, he alone was liable for the debt.

The mere fact of members of a Mahommedan family living in commensality and holding their properties jointly is not sufficient to raise the presumptions which under the Hindu Law arise from jointness.[1]

But where members of a Mahommedan family are living joint, and it is found that they are jointly in enjoyment of their shares in the properties which have descended to them from a common ancestor, the managing member cannot claim an exclusive right to those properties, or assert that the rights of the other members have become barred under the Statute of Limitation.[2] Acquisitions made by the managing member with *joint* funds, and kept *jointly*, without any differentiation, would be for the benefit of the family. But where it does not appear that the acquisitions were made with *joint* funds, in other words, with money belonging to all the members, or where the property from the time of its acquisition is kept distinctly apart from the joint properties, the other members would have no right therein.

General rule for distinguishing heirs.

Both the Sunnis and the Shiahs are generally agreed on the principle by which the individuals who are entitled to inheritance in the estate of the deceased can be distinguished from those who have no right. For example, a Mussulman, upon his death, may leave behind him a numerous body of relations. In the absence of certain determinate rules, it would be extremely difficult to distinguish between the *inheriting* and the *non-inheriting* relations. In order to obviate this difficulty and to render it easy to distinguish between the two classes, it is recognised, as a general rule, that when a deceased Mussulman leaves behind him two relations, one of whom is connected with him *through the other*, the former shall not succeed whilst the intermediate person is alive. For example, if a person on his death leave behind him a son and that son's son, this latter will not succeed to his grandfather's estate while his father is alive.

But this rule is subject to one exception. The mother does not exclude brothers and sisters, either full or uterine from succession.

[1] *Abdool Adood* v. *Mohammud Makmil*, I. L., 10 Cal. 562. See also the case of *Mohamud Afak* v. *Ekram Ali*, 14 W. R., 374.

[2] *Ashina Bibee* v. *Ajujannissa Bibee*, 11 W. R., 45.

Another rule, which is also framed with the object of discovering the heirs of a deceased individual, is that *the nearer in degree excludes the more remote*. This rule, though really covered by the former, is recognised by both schools, but there is great divergence as to the mode of its application in consequence of the difference in the classification of heirs. For example, the Sunnis prefer the *nearer in degree to the more remote*, in the succession of male agnates, whilst the Shiahs apply the rule of nearness or propinquity to all cases without distinction of class or sex. If a person die leaving behind him a brother's son and a brother's grandson, and his own daughter's son,—among the Sunnis, the brother's son being a male agnate and nearer to the deceased than the brother's grandson, takes the inheritance in preference to the others; whilst among the Shiahs, the daughter's son, being nearer in blood, would exclude the others.

It will be seen, therefore, that the right of succession of the different relations who may survive a deceased person, varies according to circumstances. Some of them are absolutely excluded by the operation of the principles referred to, whilst others have their shares reduced by the fact of their co-existing with certain relations who may or may not participate in the inheritance. But both among the Sunnis and the Shiahs there is one class of heirs who are never excluded from succession, however much their respective shares may vary. This class of heirs comprises the father, the mother, the son, the daughter, the husband or wife.

Principle of representation not recognised.

As a general rule, neither the Sunnis nor the Shiahs recognise the principle of representation. For example, if A had two sons, one of whom died during his lifetime leaving several children, these children do not possess the right of representing their father on the decease of A, but are "excluded" from the inheritance by their uncle. Similarly, if there be two sons of one son or brother, and three of another (and no son or brother, as the case may be, living at the time), the five grandsons or brothers' sons will take the inheritance *per capita* and not *per stirpes*. But the right of representation is recognised to a limited extent in the succession of the cognates. For example, half-sisters on the mother's side, when they do succeed, take the mother's share. There are some other instances of the same kind.

Primogeniture.

The rule of primogeniture is recognised in a qualified shape among the Shiahs, the Shâfeïs and the Mâlikis, who give to the eldest son the horse, the arms, the mantle, and the Koran of the father, thus allowing him a pre-eminent position among the children of the deceased. The Hanafis, on the other hand, do not observe it at all. In certain families, however, in India as elsewhere, the entire estate descends upon the eldest son.

Among the *Ismailias* the rule of primogeniture is generally recognised and acted upon.

When either of the parents is a Moslem, the Mussulman Law presumes the child to be a Moslem (until it is able to make a choice), and the right to its succession is regulated by the Laws of Islâm.

Sectarian difference no bar to succession.

Moslems inherit from each other, though they may belong to different sects, but the succession is regulated by the rules of the school to which the deceased belongs.

Rights of females.

Females co-existing with males of the same degree (or of a lower degree but entitled to succeed with them) take a smaller share than the males; but as regards dominion over property and the power of disposition and the quantum of interest derived by inheritance, they stand on the same footing as the men. So also a widow taking a share in her husband's estate acquires an absolute and indefeasible interest therein.

A right of inheritance vests by operation of law, and cannot therefore be disclaimed or rejected. Thus, an heir who refuses to take the share in a deceased person's estate to which he is entitled cannot deprive his own heirs of its benefit, and accordingly upon his death his right would devolve upon them, and they would be entitled to claim his share (subject, of course, to any bar resulting from the Statute of Limitation.)

The Mahommedan Law, pure and simple, does not recognise vested estates in remainder. In other words, whilst the property is in the hands of the owner, his heirs have no vested reversionary interest in it such as would be assignable or pass to their heirs by right of inheritance. This rule was enunciated by the Privy Council in the case of *Abdul Wahid Khan* v. *Mussumat Nuran Bibi*.[1] The facts of that case were somewhat peculiar, and though

Abdul Wahid Khan v. *Mussumat Nuran Bibi.*

[1] L. R., 12 Ind. App., p. 91.

the arrangement upon which the decision proceeded was open to another construction, their Lordships thought that under it Gauhar Bibi had remained as full owner, and consequently, her sons had no vested interest in the property.

Family arrangements.

But there is nothing in the Mahommedan Law to prevent an arrangement to the effect that A should have a life-interest in a particular property, or that an estate should be vested in him or her for life, and that upon his or her decease it should devolve upon A's heirs or any particular person or persons by way of a remainder. In fact, such arrangements are recommended under the head of *tawrîs* in order to prevent family disputes.

Funeral charges.

Funeral expenses form the first charge on the estate of a deceased person, in other words, such expenses must be paid out first. The funeral comprises the washing, shrouding, and interring of the body together with the ceremonies connected therewith including the *chihlum* (funeral service performed on the 40th day after the decease). All these are to be performed in a manner suitable to the deceased's position in life and means; and for the necessary expenses incurred therefor all his property is liable, except such as is held by somebody else in pledge, or is subject to any other special charge. After the funeral expenses are paid, the debts of the deceased must be satisfied. For his debts, except such as are charged on some specific property, all his estate is liable, excluding those so charged. The *Fatâwa Alamgiri* says: "Debts are of three kinds, *viz.* (1) those contracted in *health;* (2) those contracted at a time when the man was *in extremis* or labouring under an illness which ended fatally; and (3) those contracted partly in *health* and partly in *illness.*

"If they are all debts contracted in health, or all *in extremis*, they are all alike, and none is entitled to any preference. If they are debts partly contracted in health and partly in illness, the former are preferred, if the latter can be established only by the acknowledgment of the deceased. But when the debts contracted in illness can be established by proof, or have been openly incurred for known causes, such as the purchase or destruction of property, or the proper dower of a wife, the latter debts are on the same footing as those

Debts.

contracted in health. Debts not actually due at the time of the debtor's death become payable immediately on the occurrence of that event, because the privilege of postponement is a personal right

which dies with him. The death of a creditor has not the same effect, because the person to whom the right of delay belongs is still alive."

But a partition before payment of debts does not invalidate the division of the property, the heirs remaining liable for the debts in proportion to the assets received by each.

A decree obtained by a creditor of the deceased against some of the heirs does not bind the other heirs who have had no knowledge of the suit or who had not been properly represented in the proceedings which culminated in a decree.

Assamathennessa Bibee v. Roy Lutchmeeput Singh.

In the case of *Assamathennessa Bibee* v. *Roy Lutchmeeput Singh*,[1] the question was expressly decided. In that case it appeared that one Buzloor Rohim died possessed of considerable property, both moveable and immoveable, and leaving a widow, Fatimatunnessa, a daughter, Shurfunnessa, and a sister, Sudderunnessa, his heiresses according to Mahommedan Law. Shortly after his death, Shurfunnessa obtained from the Court of the Judge of the 24-Pergunnahs a certificate under Act XXVII of 1860 to collect debts, &c., of the deceased. A portion of the property of which Buzloor Rohim died possessed was an undivided moiety of certain premises in Calcutta, being the property in suit, and the share of his sister, Sudderunnessa, in such property was, by Mahommedan Law, a one-sixth share of such undivided moiety. After the death of Buzloor Rohim, a suit was brought in the Court of the Judge of the 24-Pergunnahs by the Land Mortgage Bank of India against Shurfunnessa and her husband and two of her husband's brothers to realise certain mortgage securities executed by Buzloor Rohim to the Land Mortgage Bank of India, but to this suit neither Fatimatunnessa nor Sudderunnessa were made parties.

Sudderunnessa at that time was, and had been for some years, absent at Medina. In execution of the decree obtained by the Land Mortgage Bank the undivided moiety of the Calcutta property was attached and sold by the Sheriff of Calcutta on the 15th of June 1875, and was purchased by the defendant, who obtained possession thereof. The certificate of sale stated that what was sold was "the right, title, and interest of Buzloor Rohim, deceased, the ancestor, and of the defendants (naming them), the

[1] I. L., 4 Cal., 142.

representatives, in a moiety of a piece of land situate in Jaun Bazar Street, &c."

On the 1st of December 1875, Sudderunnessa sold and assigned her share in (among other property) the undivided moiety of the premises in Calcutta to the plaintiff, who brought a suit to recover the subject of his purchase, contending that the share of Sudderunnessa did not pass and was unaffected by the sale of the 15th June 1875. The defendant contended *inter alia*, that the property in suit was, by Mahommedan Law, subject to the payment of the debts of the deceased proprietor, and having been sold in payment of such debts, the deceased proprietor's heirs and representatives had no right, title, or interest in such property, and the suit should therefore be dismissed.

The suit was decided by the first Court in favour of the plaintiff. On appeal, there being a difference of opinion among the Judges, the question was referred to a Full Bench. The Chief Justice in delivering the opinion of the majority, expressed himself thus :—

"The question, therefore, comes back to this : whether the decree, which was thus obtained, affected the share of Sudderunnessa, who was not a consenting party to it ; and this question must, in my opinion, be determined by the Mahommedan Law, so far as that law upon the subject can be ascertained. It was strongly urged upon us by Mr. Jackson, on behalf of the appellant, that as the whole of the immoveable property of Buzloor Rohim was in the possession of the defendants in the above suit, those defendants by Mahommedan Law represented the entire estate of Buzloor Rohim, and the decree against them bound the share of Sudderunnessa, as well as their own shares, and in support of that contention, he relied upon the following passages from the *Hedâya* :—

"In Book XX, chapter 4 (relating to the duties of the Kâzi), it is said : 'Any one of the heirs of a deceased person may stand as litigant on behalf of all the others, with respect to anything due to or by the deceased, whether it be debt or substance, &c.' To this it is objected : 'If one heir be litigant on behalf of the others, it would follow that each creditor is entitled to have recourse to him for payment of his demand, whereas, according to law, each is only obliged to pay his own share.' Reply : 'The creditors are entitled to have recourse to one of several heirs only in a case *where all the effects are in the hands of that heir*. This is what is stated in the

Jama Kabeer, and the reason of it is, that although any one of the heirs may act as plaintiff in a case in behalf of the others, yet he cannot act as defendant on their behalf, unless the whole of the effects be in his possession.'

"Assuming that these passages do establish that, by the Mahommedan Law, if the whole of the immoveable property of a deceased debtor be in the hands of one of his heirs, that heir may be sued by a creditor as representing the entire estate, and that a decree obtained against him would be binding as against the other heirs, it does not appear from the text of the *Hedâya* how far the rule thus laid down would be applicable in the case of a suit brought against two or more of several heirs who may be in possession of the property, nor whether the heir who is sued should be expressly charged as representing the whole estate of the deceased, nor whether the absent heirs should be mentioned in the proceedings.

"But it appears clear from another passage in the *Hedâya*, to which our attention has also been called, that an absentee heir would certainly not be bound by a decree obtained in such a suit, unless the proceedings are duly conducted, and the plaintiff's case proved in open Court; and that a decree by consent of the heir who is sued would not be binding on the other heirs. In Book XXXIX, chapter 1, on the subject of Partition, it is said: 'As where a man sues for a debt against an estate, and an heir or executor acknowledges his claim, in which case such acknowledgment as being to the detriment of the others, is not sufficient, but the claimant must produce evidence before the Kâzi in his suit even against that heir or executor before he can establish his claim against the estate in general to the prejudice of the other heirs.'

"This appears to me a direct authority, that a decree by consent against one heir of a deceased debtor cannot legally bind the other heirs; and this rule is founded on the most manifest justice; because, although, for the sake of convenience, the share of an absentee heir may be bound by proceedings taken in open Court and in due course of law, as in such case the presence and sanction of the Judge, and the public nature of the proceeding, operates as a protection to the absentee, and as a guarantee for the *bona fides* and justice of the decree itself, it is obviously very different in the case of a decree made merely by consent, because there the absentee is entirely at the mercy of the consenting party, and there is no

security whatever, either for the justice of the decree, or for the protection of the absent heir from any fraud or collusion, which may be practised against him."

Jafri Begum v. Amir Mahomed Khan.

In the case of *Jafri Begum* v. *Amir Mahomed Khan*,[1] the Allahabad High Court followed this principle, but made the recovery of the share by the heir who was not a party to the suit contingent upon the payment by him of his proportionate share of the debt. In this case it appeared that a Mahommedan died intestate leaving unpaid debts. The High Court of Allahabad held that the ownership of his estate devolved immediately on his heirs, and that such devolution was not contingent upon and suspended till the payment of such debts; that is, a decree relative to his debts, passed in a contentious or non-contentious suit against only such heirs as were in possession of the whole or part of his estate, did not bind the other heirs who, by reason of absence or other cause, were out of possession, nor did such decree convey to the auction-purchaser, in execution of such a decree, the rights and interests of the heirs who were not parties to the decree. It held further that where in execution of a decree for a debt due by a Mahommedan who had died intestate, passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree-holder put up for sale and purchased certain property which formed part of the said estate and one of the heirs, who was out of possession, and who was not a party to these proceedings, brought a suit against the decree-holder for recovery of a share of the property sold in execution of the decree, by right of inheritance, that the plaintiff was not entitled to recover from the auction-purchaser, in execution of the decree, possession of the share, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed, and in satisfaction whereof the sale took place.[2]

As usual, however, there is no uniformity in the decision of the Courts even in this question. In the case of *Muttyjan* v. *Ahmed Ally*,[3]

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[1] I. L. R., 7 All., p. 822.

[2] See also *Wakedun-nessa* v. *Sheobrathan*, 6 B. L. R., 54; *Muzher Ali* v. *Boodh Sing*, I. L. R., 7 All., 297; *Bachman* v. *Bachman*, I. L. R., 6 All., 583; *Hamir Singh* v. *Zapia*, I. L. R., 1 All., 57; and *Muttyjan* v. *Ahmed Ali*, I. L. R., 8 Cal., 370.

[3] I. L. R., 8 Cal., 370.

it appeared that after the death of a Mahommedan, several of his creditors sued his widow and daughter, and obtained decrees against the assets of the deceased, which assets had come into the possession of the mother and daughter. In execution of these decrees portions of the property left by him were sold: thereupon two married sisters of the deceased, who lived with their husbands apart from the widow and daughter, sued as heirs of the deceased to recover their shares of the property sold. The Calcutta High Court held that the property of the deceased having been attached and sold in payment of his debts, the plaintiff's suit must be dismissed, for the learned Judges thought, when a creditor of a deceased Mahommedan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration suit; and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.[1] *Mutiy Jan* v. *Ahmed Ally.*

Where the heirs of a deceased Mahommedan have divided his estate among themselves according to the Mahommedan Law, a small debt being due from the estate at the time of division, and two of the heirs were subsequently sued for the entire debt, it has been held that inasmuch as such heirs had not by sharing in the estate rendered themselves liable for the whole of such debt, and as any decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of the debt, but only for a share proportionate to the share of the estate they had taken.[2]

In another case it appeared that two of the widows of a deceased Mahommedan had sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians. The Allahabad High Court held that if the plaintiff was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained

[1] The practitioner may refer also to the following cases, though no principle can be gathered from them; *Nuzeerun* v. *Ameerooddeen*, 24 W. R., 3; *Kishwar Khan* v. *Jewan Khan*, 1 Sel. Rep., 25; *Khajah Hidayutoollah* v. *Rai Jan Khanum*, 3 Moore's, I. A., 295.

[2] *Perthipal Singh* v. *Husaini Jan*, I. L., 4 All., 361.

decrees, she could not be bound by the decrees nor by the sale subsequently effected, but that she was entitled to recover her share, subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected.[1]

The creditor of a deceased Mahommedan cannot follow his estate into the hands of a *bona fide* purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and be affected by the doctrine of *lis pendens*.[2]

Where in execution of a money-decree against the heirs of a deceased Mahommedan for a debt incurred by him, a person A purchased certain property which had been allotted to the widow of the deceased in lieu of dower and of her share of the inheritance, and it appeared that previously to the purchase, the widow had mortgaged the same property to B, who, at the time of the mortgage, knew of the debt for which the decree was obtained, in a suit by B against A on the mortgage, it not being shown that there were not assets in the hands of the heirs-at-law to satisfy the debt due to A's vendor, it was held that B was entitled to recover.[3]

Bequests to be paid after discharge of debts out of a *third*.

After payment of the funeral expenses and the debts, any valid bequest made by the deceased is to be discharged out of a *third* of what remains, unless the heirs allow them beyond a third. The residue is then to be divided among the heirs.

Ancient Arab customs.

The ancient Arab customs had one principal object in view in the succession of a deceased person's property, *viz.*, the maintenance of the goods in the family. With this view, the succession was confined exclusively to the male relations, and even among them to those who were capable of bearing arms. The daughters, the widows, the mothers, as well as the minors, were directly or indirectly excluded from succession ; the daughters because their birth was

[1] *Hamir Sing* v. *Zakia*, I. L. R., 1 All, 57. See also *Mutty Lall Dhur*, I. L. R., 2 Cal., 395.

[2] *Bazayet Hossein* v. *Dooli Chand*, *Mahomed Wajed* v. *Tayyaban*, I. L. R., 4 Cal., 402 : L. R., 5 I. A., 211.

[3] *Narsingh Das* v. *Najmoodin Hussein*, I. L. R., 8 Cal., 20 : 10 C. L. R., 225.

regarded as a misfortune,[1] and because they ceased upon their marriage to be members of the natural family; the widows because they were placed in the same category as slaves and passed ordinarily into the hands of their husband's heirs as a portion of his patrimony[2]; the minors because they were unable to defend by their arms the tribal rights and privileges, and their goods therefore belonged to their tutors.[3]

Among the Jewish tribes who followed the Rabbinical Law, the succession devolved in the first place on the sons, and the lineal male descendants, then on the daughters and their descendants, then on the father; fourthly, on the brothers and their descendants; fifthly, on the sisters and their descendants; and sixthly, on the grandfather, the uncles, the aunts, and so on. Jewish rules.

Among the descendants, the sons had preference over the daughters, who occupied a secondary position even to their brother's daughters. When a man died leaving the sons of a predeceased son and also the daughters of another predeceased son, the property was divided *per stirpes*, each group taking the share to which the person from whom they respectively received their title was entitled. The same rules applied to the succession of collaterals. The mother inherited nothing from her children. Illegitimate children when acknowledged had the same rights as the legitimate offspring. The succession of an illegitimate child devolved first upon the father, and, in his absence, passed to the State, or to the communal fund, as the case proved to be. Nor had the daughters any interest in the succession of their mother.

The uterine brothers and sisters had no right of succession.[4]

The Arabian Legislator reformed the entire pre-Islâmic customs. He gave, by express provision of the law, rights of inheritance to those who were excluded by the ancient institutions.[5] One of the great results of the new legislation was to raise women in the scale of civilisation, by elevating their moral and social position, and giving the widow, the mother, the daughters, and sisters heritable rights. The Reforms of Mohammed.

[1] Koran, chap. lxxxi., v. 8.

[2] Koran, chap. xliii., v. 16.

[3] Koran, chap. iv., vv. 2, 4, 5, 6, 7, and 11; chap. vi., v. 153; chap. xvii., v. 36

[4] Comp. M. Sautayra. •

[5] See Koran, chap. iv., v. 8, 12, 13, 14, 15, 57, and 175.

The provisions of the Mahommedan Law relating to succession are based on the following passages of the Koran :—

"God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one, she shall have the half: and the parents of the deceased shall have each of them a sixth part of what he shall leave if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part: and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath, and his debts be paid.

"Ye know not whether your parents or your children be of greater use unto you. This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts be paid: they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid: and if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate, but if there be more than this number, they shall all be equal sharers in the third part, after the payment of the legacies which shall be bequeathed and the debts, without prejudice to the heirs.

"They will consult thee for thy decision in certain cases: say unto them God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave; and he shall be heir to her, in case she have no issue, but if there be two sisters, they shall have, between them, two-third parts of what he shall leave: and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."

"In these provisions," says Mr. Macnaghten, "we find ample attention paid to the interests of all those whom nature places in the first rank of our affections; and indeed it is difficult to conceive any system containing rules more strictly just and equitable."

Right of Inheritance.

But the rules laid down in the Koran are amplified in the decisions of the Caliphs and Imâms. Under the Mussulman Law as it now exists the right to inheritance is founded on three different rights—(1) *nasab* or *karâbat*, kinship; (2) *sabab*, special cause, *viz.*, a *valid* marriage, for the parties to a marriage which is either *void* or *invalid*[1] have no right of inheritance to each other[2]; and (3) *walâ*, which is of two kinds *viz.*, *walâ-ul-Itâk*, the *walâ* of emancipation, and the *walâ-ul-mawâlât*, or *clientage*.

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[1] See *post*.

[2] *Durr-ul-Mukhtâr*, 852.

CHAPTER II.

HANAFI LAW OF SUCCESSION.

Section I.

Classification of Heirs.

All the heirs, natural, civil, or political (*Warasat-ul-murattabè*) are divided for the sake of convenience into two groups.

The first group is composed of the sharers (*Ashâb-ul-Farâiz* or *Zav-il-Furûz*).

The second group called *Ahl-ul-mîrâs*, is composed of the heirs who take a residuary interest, and is divided into seven classes.

First Group.

1. The Sharers (*Ashâb-ul-Farâiz* or *Zav-il-Furûz*), *viz.*, those whose shares are specified in the Koran, the traditions or by the *Ijmâa-ul-Ummat*.

Second Group.

2. *Ahl-ul-mîrâs.*

(Heirs who take a residuary interest.)

First Class.

Asabat-un-Nasabiyè (Residuaries by the tie of blood).

[This class comprehends all the natural heirs in the male line. They are divided into four sections and an infinity of branches, the rule being that the nearer always excludes the more remote.]

(*a*) The lineal male descendants (*juzz-ul-myèt*).

(*b*) The lineal male ascendants (*asl-ul-myèt*).

(*c*) The direct collaterals, *viz.* (1) full brothers ; (2) consanguine brothers ; (3) sons of full brothers, (4) sons of consanguine brothers (*juzz'-ab-il-myèt*).

(*d*) The indirect collaterals, *viz.* (1) full uncles ; (2) consanguine uncles ; (3) sons of full uncles ; (4) sons of con-

sanguine uncles, &c.; (5) full uncles of the father ; (6) consanguine uncles of the father ; (7) sons of the full uncles of the father ; (8) sons of the consanguine uncles of the father, &c. ; (9) full uncles of the grandfather, &c. (*juzz'-jad-il-myèt*).

In this class are also included females who take an interest by virtue of co-existence with a male residuary.[1]

SECOND CLASS.

Asabat-us-Sababiyè (Residuary for special cause).

The emancipator or his nearest male residuary.

[In case there is no residuary of either class, the residue is *returned* to the sharers. This is technically called *radd*.]

THIRD CLASS.

Uterine relations (*Zav-il-Arhâm*).

[This class comprises all heirs who are connected with the deceased through females. They are divided into four sections, the nearer excluding the more remote.]

(*a*) The sons and daughters of daughters, and their children of both sexes, *how low soever* (*awlâd-ul-banât*).

(*b*) The father of the paternal grandmother and the mother of the maternal grandfather. After them their ascendants (*ajdâd-ul-fâsidîn*).

(*c*) The children of sisters, how low soever (*awlâd-ul-akhwât*).

The daughters of full and consanguine brothers and their children (*banât-ul-akhwièh*).

The sons of uterine brothers and their children (*awlâd-ul-akhî-li-ummin*).

(*d*) Paternal aunts—(1) full ; (2) consanguine ; or (3) uterine (*ammât*).

Their children in the same order.

Maternal uncles, same (*akhwâl*).

Their children, same.

Maternal aunts, same (*khâlât*).

Their children, same.

Uterine paternal uncles and aunts (*al-amâm-li-ummin*).

Their children.

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[1] See *post*.

FOURTH CLASS.

Mowla-al-Mawâlât.

The patron of the deceased, who leaves no other heir.

FIFTH CLASS.

Mukir-unn-Leh.

Adopted heir or heir by acknowledgment, "a person in whose favour the deceased has made a declaration of *nasab*, or descent, as against another, but not such as to establish his descent, and has persisted in such declaration to his death. In this, three conditions are implied: the declaration of descent must be as against another, as, for instance, when the deceased has declared a person of unknown descent to be his brother, which involves a declaration against his father that the person is his son; the declaration must be such as not to establish the descent of the person acknowledged, as when it is not acquiesced in by the father; and the acknowledgor must die without retracting his acknowledgment."[1]

In other words, an heir by acknowledgment is one in respect of whom the deceased (both the acknowledgor and acknowledged being persons of unknown descent) has admitted a tie of blood. For example, if two persons of unknown parentage call themselves brothers, and one of them dies without leaving any *known* heirs, the other person would be entitled to the deceased's inheritance.

SIXTH CLASS.

The universal legatee, in other words, one to whom the deceased has bequeathed the whole of his property.

SEVENTH CLASS.

Bait-ul-Mâl.

The Public Treasury (for the benefit of all the Mussulmans).

It will be seen from the above that the heirs connected to the deceased by the tie of blood are divided into three classes, *viz.*—

(1) The *Zav-il-Furûz* (the "Sharers,") persons whose shares are specified in the Koran, the traditions, or by the *Ijmâa-Ummat*.

(2) The *Asabâh*[2] (the "agnates").

(3) The *Zav-il-Arhâm* ("cognates" or "uterine relations").[3]

[1] *Hedâya.*

[2] Called by English writers 'Residuaries.'

[3] Called by English writers 'the Distant Kindred.' The word literally means "uterine relations" and signifies, generally speaking, relations connected with the deceased through females. It is equivalent to the word *bandhu* in Hindu Law.

With reference to the *Zav-il-Furûz* (the "Sharers"), there is no difference between the Shiahs and the Sunnis. But the former repudiate entirely an arbitrary classification of heirs into agnates and uterine relations. Accordingly, they do not recognise the distinction of *Asabâh* and *Zav-il-Arhâm;* they group all the heirs together and treat them with respect to their degree of propinquity to the deceased, as will be shown hereafter. Among the Sunnis, however, the uterine relations are placed in the last category ; and it is only in the absence of sharers, agnates and the emancipator that they receive any share in the inheritance.

The Sharers take their specified portions, and the residue is then divided among the agnates. Should there be no agnates but only the uterine relations the residue would revert or *return* to the sharers in proportion to their shares except in the case of husband or wife, &c. If neither sharers nor agnates[1] should exist, then the estate is divided among the uterine relations.

The "Sharers," or *Zav-il-Furûz*, are twelve in number. Their shares are liable to variation, according to circumstances, and some of them are subject also to entire exclusion, owing to the operation of the two principles of elimination specified above. Four of these sharers are males and eight females. The four males are (1) the father ; (2) the grandfather or lineal male ascendant (when not excluded) ; (3) the *uterine* brother ; and (4) the husband. The "Sharers."

1. The father.—The Sunni lawyers attribute to the father three characters—(1) the character of a simple sharer when the deceased happens to have a lineal male descendant ; (2) the character of a simple residuary when he co-exists with a person who is only a sharer—as a husband, a mother or a grandmother—when he takes the residue of the estate after the allotment of the share or shares ; and (3) the character of both a sharer and a residuary, as when he co-exists with a daughter or daughters. In this case he takes first his share, and then becomes entitled to any residue after allotment of the daughter or daughters' shares. For the sake of simplicity in the latter two cases, he may be said to take simply as a residuary. The father.

1. The father's share when the deceased leaves a son or a son's son or lineal male descendants, like son's sons or son's son's son, is $\frac{1}{6}$.

[1] See *Gujjadhur Proshad* v. *Abdoollah*, 11 W. R., 220.

2. A *true* grandfather or lineal male ascendant (who is not excluded by the father or a nearer ascendant), $\frac{1}{6}$.

3. Uterine brother (when only one, and no child, son's child, father, or *true* grandfather), $\frac{1}{6}$.

[The word "son" here and in the following passages includes any lineal male descendant.]

The Sunnis or rather the Hanafis divide ascendants for purposes of succession into two classes, viz., *true* and *false*.

True and *false* ancestors.

[A *true* grandfather is an ascendant in whose line of relationship no female intervenes. For example, a father's father is a *true* grandfather; whereas a mother's father is a *false* grandfather. A *true* grandmother is a female ancestor in whose line of relationship with the deceased no *false* grandfather intervenes; thus a mother's mother or a father's mother or father's father's mother are *true* grandmothers, whereas mother's father's mother is a *false* grandmother. None of these distinctions exist in the Shiah Law.]

When two or more and no child or son's child, father, or *true* grandfather, $\frac{1}{3}$.

4. Husband (when the deceased leaves a child or son's child, how low soever), $\frac{1}{4}$.

Without them, $\frac{1}{2}$.

5. (Wife when the deceased has left no child or son's child, how low soever), $\frac{1}{4}$.

Co-existing with a child or son's child how low soever, $\frac{1}{8}$.

As already pointed out, polygamy is, to a limited and qualified extent, recognised among certain sections of Mahommedans. In consequence of the partial recognition of polygamy, it sometimes happens among these Mussalmans that the deceased leaves him surviving more than one widow. In such a case the widows will take the $\frac{1}{4}$ or $\frac{1}{8}$, as the case may be, between them.

6. Daughter (when only one and no son, so as to render her a residuary), $\frac{1}{2}$.

Two or more (and no son), $\frac{2}{3}$.

7. Son's daughter (or son's son's daughter, how low soever)—

(*a*) when only one and no child or son's son, $\frac{1}{2}$.

(*b*) when two or more and no child or son's son, $\frac{2}{3}$.

(*c*) when one daughter and no son or son's son $(\frac{2}{3}-\frac{1}{2})=\frac{1}{6}$.

8. Mother (when co-existing with a child of the *propositus* or

his or her son's child how low soever, or two or more brothers and sisters, whether consanguine or uterine), $\frac{1}{6}$.

When not, $\frac{1}{3}$.

But $\frac{1}{3}$ of *remainder* after deducting husband's or wife's share, when with *father*; $\frac{1}{3}$ of *whole* when with *grandfather*.

9. A *true* grandmother, how high soever (when not excluded by a nearer *true female* ancestor), $\frac{1}{6}$.

[Every one into whose line of relationship to the deceased a mother enters between two fathers is a *false* grandmother. The share of the *true* grandmother, on the father's or mother's side, is a sixth, whether there be one or more; all partaking of it equally who are in the same degree. When there are two grandmothers, one of whom is related to the deceased on both sides, another only on one side, Abû Yusuf has said, and there is one report to the same effect from Abû Hanîfa, that the sixth is to be divided between them equally, and the *Fatwa* is in accordance with this opinion.]

10. Full sister (when only one and no son, son's son how low soever, father, *true* grandfather, daughter, son's daughter or brother), $\frac{1}{2}$.

When two or more and no such excluder, $\frac{2}{3}$.

11. Consanguine sister (when only one and no excluder as above or full sister), $\frac{1}{2}$.

When two or more and no such excluder, $\frac{2}{3}$.

12. Uterine sister takes like *uterine brother*.

These represent the sharers, persons whose shares are specified in the Koran, and with reference to whom, therefore, there is little or no difference between the Sunnis and the Shiahs.

"Residuaries."

Residuaries.—The residuaries or *Asabâh* are divided into two classes, viz., *asabâh* by *nasab* or kinship to the deceased and *asabâh* by *sabab* or the special cause of *walâ*. The former again is divided into three classes—(1) residuaries in their own right; (2) residuaries in another's right; (3) and residuaries together with another.

The first class includes all those male relations in whose line of relationship to the deceased no female enters;—(for if a female were to come in, the male is no longer a residuary, *e.g.*, a mother's son is not a residuary but a sharer[1]). These are the *Asabâh proprio jure* (*Asabâh-be-nafsihî*).

[1] *Durr-ul-Mukhtâr*, 864.

"Residuaries in their own right."

Residuaries in their own right are divided into four sub-classes :—

(1) The offspring of the deceased ;

(2) His root, *i.e.*, the ascendants ;

(3) The offspring of his father, *viz.*, the brothers and their descendants ;

(4) The offspring of his grandfather *how high soever.*

Consequently, descendants in the male line of the paternal great-grandfather of an intestate are within the class of residuary heirs and entitled to take to the exclusion of the children of the intestate's sisters. Likewise descendants of a paternal grandfather's brother are residuaries and entitled to the inheritance in preference to granddaughters in the female line.

It must be remarked that in the succession of the *Asabâh* proper, when the relations are of the same degree of affinity, preference is given to the strength of blood or consanguinity. For example, when the deceased leaves a full brother and a half-brother by the same father only, though the degree of affinity is the same, yet the tie of blood being stronger in the case of a full brother than in that of the half-brother, preference is given to him. In the same way a sister by the same father and mother (co-existing with a daughter) is preferred to a brother by the same father only ; and the son of a full brother is preferred to the son of a half-brother on the father's side. The *Durr-ul-Mukhtâr* lays down as a legitimate conclusion from the Prophet's doctrine, "surely kinsmen by the same father and mother shall inherit before kinsmen by the same father only," that where relations are of an equal degree of affinity, regard is to be paid to the strength of blood.

The *Fatâwa Alamgiri* defines the *asabâh-be-nafsihi* to mean 'every male into whose line of relation to the deceased no female enters,' and such residuaries are of four sorts—the offspring of the deceased, and his root, the offspring of his father, and the offspring of his grandfather. Hence the nearest of the residuaries is the son ; then the son's son, how low soever ; then the father ; then the grandfather, or father's father, how high soever ; then the full brother ; then the half-brother by the father ; then the son of the full brother ; then the son of the half-brother by the father ; then the full paternal uncle ; then the half paternal uncle on the father's side ; then the son of the full paternal uncle ; then the son of the half paternal uncle ; then the full paternal uncle of the father ;

then the half-paternal uncle of the father on the father's side; then the son of the father's full paternal uncle; then the son of the father's half-paternal uncle on the father's side; then the paternal uncle of the grandfather; then his son how low soever.

When there are several residuaries in the same degree, the property is divided between them "by bodies, not by families" (*i.e.*, *per capita* and not *per stirpes*). As, for instance, when there is a son of one brother and ten sons of another, or the son of one paternal uncle and ten sons of another, the property is to be divided into eleven parts, of which each takes one part.

"Residuaries in another's right."

The *résiduaries in another's right* are those females who become residuaries only when they co-exist with certain males, that is, when there happen to be males of the same degree, or who would take as such, though of a lower degree.[1]

These are four in number, *viz.*:—

(1) Daughters (with sons).

(2) Son's daughters (with a son's son or a male descendant still further removed in the direct line).

(3) The full sister (with her own or full brother).

(4) The sister by the same father, or, in other words, a consanguine sister (with her brother).

But it must be remembered that many males may become, in certain contingencies, residuaries, but it does not follow that in all cases their sisters would become residuaries *with* them. It is only when the female is a sharer herself that, instead of taking a share, she takes as a residuary when co-existing with a male residuary. For example, if a Mussulman dies leaving behind him a wife, a paternal uncle, and an aunt, "be the latter by the same father and mother, or by the same father only," the aunt, not being a *sharer* according to law, is not entitled to any share in the inheritance of her deceased nephew, and her brother (the uncle) takes the entire estate after allotment of the widow's share.

"Residuaries together with others."

The *residuaries together with others* are those females who become residuaries when co-existing with other females :—

(1) Full sisters, or half-sisters on the father's side with daughters or son's daughters.

When a person dies leaving behind him several relations who

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[1] *Durr-ul-Mukhtâr*, pp. 864, 865.

may be classed as residuaries of the different kinds indicated, preference is given to propinquity to the deceased, so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first.[1]

Thus when a man has died leaving a daughter, a full sister, and the son of a half-brother by the father,—one-half of the inheritance is given to the daughter and the other half to the sister, who is a residuary *with* the daughter and nearer to the deceased than the brother's son.[2] So, also, when there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance. Likewise, when in the place of the brother's son there is a half-brother by the father, there is nothing for the half-brother.[3] The remaining residuaries, that is, *all besides these*, take the residue alone, that is, the males take it without any participation of the females, and they are also four in number, the paternal uncle and his son, brother, and the son of an emancipator.

[The Sunni Law places the emancipator and his or her *male* residuary next in order of succession, but as slavery even in the mild form recognised under the primitive Mahommedan system, is extinct in India, I shall discuss this branch later.]

The residuaries of a *walad-uz-zina*, "a child of fornication," and of the son of an "imprecated" woman (a woman who has been repudiated by a proceeding for adultery and disavowal of parentage) are the kindred of their mother. So, that if the son of an "imprecated" woman should leave a daughter, a mother, and the "imprecator," the daughter would take a half, the mother a sixth, and the remainder would revert to them as if he had no father. If besides these there were also a husband or a wife, he or she would take his or her share, and the remainder lie between the others, either as their share or by way of *return*. And if he should leave his mother, a half-brother by the mother and a son of the "imprecator," the mother would take a third, the half-brother by the mother a sixth, and the remainder would revert to them, there being nothing for the son of the imprecator, as the deceased has no brother on the side of the father.

A disavowed child.

When the child of the son of an "imprecated" woman dies, the family of his father inherit to him, being his brothers; but the

[1] *Durr-ul-Mukhtár*, 865. [2] *Fatáwa Alamgiri*, Vol. VI. p. 629. [3] See *ante*.

family of his grandfather, who are his paternal uncles, and their children, do not inherit to him. The same is true of the *walad-uz-zina*, except that there is a difference between them in one case, which is that the *Tawâm*, or twin of the *walad-uz-zina*, inherits only as a half-brother by the mother, while the twin of an "imprecated" son inherits as a full brother.[1]

Uterine relations.—When there are no sharers or residuaries, the "uterine relations" succeed to the inheritance of the deceased according to the class to which they belong and to their respective claims. "Uterine Relations."

Some writers have fallen into a mistake in supposing that the husband or wife also exclude the "uterine relations"[2] from sharing in the patrimony of the deceased ancestor. This is an erroneous idea. The *Zav-il-Arhâm* are always entitled to a share when coexising with the husband or wife.[3]

The *uterine relations* are divided into four classes, *viz.*:—

(1) The children of daughters or of son's daughters.

(2) *False* grandfathers and *false* grandmothers.[4]

(3) The daughters of full brothers and of half-brothers (by the same father only) and the children of half-brothers by the same mother only, and the children of sisters.

(4) Father's half-brothers and sisters by the same mother only, and their children; the deceased's paternal aunts and their children; maternal uncles and aunts and their children; the daughters of full paternal uncles and half-paternal uncles by the same father only.

The general order of succession is according to their classification, the first class succeeding first, and so on.

Among the individuals of the various classes, succession is regulated by proximity to the deceased.

If the claimants be equal both in sides as well as in degree, then the child of an heir is preferred; but if the sides differ, the person related on the father's side is entitled to double the share given to the person related on the mother's side.[5]

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[1] A man may deny one of twins and acknowledge the other, but in that case the paternity of both is established (*Hedâya*, Vol. II., p. 325); so that each is full brother or sister to the other.

[2] See for *e.g.*, Shama Churn Sircar's *Lectures*, 1873.

[3] *Durr-ul-Mukhtâr*, 873.

[4] *False* in contradiction to *true*, see *ante*.

[5] *Durr-ul-Mukhtâr*, 870.

Of the individuals of the first class of distant kindred—which comprises the children of daughters and the children of son's daughters,—the nearest of them in degree to the deceased is the person preferably entitled to the succession.

Thus the daughter of a daughter will take in preference to the daughter of a son's daughter.[1]

If the claimants be equal in degree, that is, if all be related to the deceased in the second, third or fourth degree, as the case may be,—then the child of an heir is preferred to the child of a distant relation, *e.g.*, the child of a sharer or a residuary is preferred to the child of an uterine relation, *e.g.*, a son's daughter's daughter is preferred to a daughter's daughter's son.

If the claimants be equal in sides as well as in degree, then the child of an heir, whether a sharer or a residuary, is preferred; but if the sides differ, the person related by the father's side is entitled to $\frac{2}{3}$, and the person related by the mother's side is entitled to $\frac{1}{3}$.[2]

But if their degrees be equal, and there be not among them the child of an heir, or if they all be related through an heir, then, according to Imâm Mohammed, whose opinion is followed in India by the Hanafî (Sunni) sect,—the shares would be regulated by the number and sex of the persons existing at the time the inheritance opens, provided the persons through whom the claimants are connected with the deceased are of the same sex, or, as it is technically said, "provided the sex of the *roots* agree." (So far Abû Yusuf coincides with him.)

But if "the sex of the roots" differ, or, in other words, if the persons through whom the claimants happened to be connected with the deceased, differ in their sex, then according to Imâm Mohammed, whose opinion on this point is followed by the Indian Sunnis, the shares are not regulated by the number and sex of the claimants but "by the roots," in other words, they take *per stirpes*.

According to the rule of Abû Yusuf, which, being simpler and more intelligible, is followed throughout Western Asia, in every case where the claimants are of an equal degree, and there is not among them the child of an heir, the property is divided with reference to the sex and number of the claimants.[3]

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[1] *Fatâwa Alamgiri*, Vol. VI, p. 637. [2] *Durr-ul-Mukhtâr*, 870.
[3] *Sirâjia*, 46, 131; *Fatâwa Alamgiri*, Vol. VI, p. 638.

The following Table will elucidate Imâm Mohammed's rule more clearly :—

S	S	S	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	D	D	D	D	D	D
S	[a]	D^b	S	S	S	D	D	D	D	D	D
D	D	D	S^b	D^d	D^e	S	S	S	D	D	D
D	S^a	D^c	D	D	D	S	D	D	S	D	D
D^1	D^2	D^3	D^4	D^5	S^6	D^7	D^8	S^9	D^{10}	S^{11}	D^{12}

Here are twelve people of both sexes,[1] three males and nine females in the sixth generation, standing in the same rank or degree of affinity. Abû Yusuf would divide the property into fifteen shares, giving one share *each* to the females and two shares each to the males. The rule of Imâm Mohammed.

But Mohammed would divide the property into 60 shares, giving to claimant No. 1, 12 shares ; No. 2, 8 shares ; No. 3, 4 shares ; No. 4, 9 shares ; No. 5, 3 shares ; No. 6, 6 shares ; No. 7, 2 shares ; No. 8, 4 shares ; No. 9, 3 shares ; No. 10, 2 shares ; No. 11, 1 share ; No. 12, 6 shares.

And this division he would make on the following basis :—

In the first column there are three males and nine females ; divide the property into 15 shares, which would give exactly 2 shares to each male and 1 share to each female.

In the second column, which implies the second generation, the members happen to be all of the same sex. Mohammed passes them over.

When he arrives at the third column or the third generation, he finds under the three males of the first column, one male and two females *viz.* D_a and D_b. He takes the 6 shares of these three males and divides them among the one male and two females in the third column, in the proportion of two shares for the male and one share each for the female, so that the male gets 3 out of 6, and the two females get $1\frac{1}{2}$ each.

Under the nine females of the first column, who each took one share we find in the third column three males and six females. Mohammed,

[1] *S* representing the son and *D* the daughter.

in order to give each male a share double that of each female, would have to make the 9 into 12, but as 12 leaves a remainder when divided among 9, he takes the 4, the resultant of 12, by the common divisor 3, and multiplies the original shares by 4, so as to give 60. Accordingly, he would divide 60 now among the original heirs (of the first generation), by which the three sons would get 8 each, that is, 24 among the three, and the daughters 4 each.

The 24 shares of the three males of the first generation are brought down to the three persons just beneath them in the third generation and divided in the proportion of 2 to a male, and one to a female by which the male in the first perpendicular column and the third horizontal column gets 12 for himself and the two females, *viz.* D_a and D_b 6 each; the share of S, *viz.* 12, there being no difference or break in the sex of his heirs, is received by his female descendant (D_1) in the sixth generation.

The 12 shares of D_a and D_b in the third column is divided in the same way in the generation in which the difference of sex occurs, that is, the fifth generation, by which S_a in the fifth horizontal column gets 8 and passes the same on to his descendant in the sixth generation, and the same is the case with D_c in the fifth horizontal and the third perpendicular column.

So that D_1 gets 12.
„ D_2 „ 8.
„ D_3 „ 4.

The 36 shares obtained by nine the females of the first generation are divided in the third generation, when the break in the uniformity of the sex takes place, in the usual manner, by which three sons obtain among themselves 18 shares and the six daughters 18 shares. In the fourth generation, under the three males or sons, we find one male and two females, and the 18 shares are divided among them accordingly, giving 9 shares to S_b in the fourth column, who passes it on without break to D_4. The 9 shares of the two females in the fourth generation, *viz.*, D_d and D_e, in the fifth and sixth perpendicular columns, come down as a whole to the two persons in the sixth column and underneath them, and then are divided according to the usual mode, by which D_5 gets 3 shares and S_6 gets 6, and so on.

If a person leave at the time of his death the following heirs:—

Two sons of a daughter's daughter's daughter; a daughter of a

daughter's daughter's son and two daughters of a daughter's son's daughter in the following form—

Daughter.	Daughter.	Daughter.
Daughter.	Daughter.	Son.
Daughter.	Son.	Daughters.
2 Sons.	Daughter.	2 Daughters.

The two daughters on the right-hand side carried on to the second line stand as four daughters, the single daughter in the middle carried to the second line would stand as *two* daughters, and the two sons merely as *two daughters*. That would give 7 shares to be divided according to the position of the ancestor in the second line, which would give $\frac{4}{7}$ to the son in the second line, and $\frac{3}{7}$ between the two daughters in the same line. Multiplying 7 by 4 to give integral resultants, the two daughters on the left-hand side in the last line receive $\frac{4}{7}$ of 28, that is, 16 ; whilst the two daughters in the second line take $\frac{3}{7}$ of 28, and pass on the same to their descendants in the fourth grade, so that the daughter in the middle takes *six*, and the two sons to the left take *six* between them.

Consideration paid to blood.

In addition to sex, consideration is also paid in the succession of uterine relations to the *sides* from which they are related to the deceased. In this also the two lawyers differ. According to Mohammed, the strength of blood of the persons from whom the surviving heirs derive their title, or what is called the sides in the roots is taken into consideration ; whilst, according to Abû Yusuf, the strength of blood in the heirs themselves, or what is called the sides in the persons, is considered,[1] *e.g.* :—

Daughter.	Daughter.	Daughter.
Daughter.	Son.	Daughter.
2 Daughters.		Son.

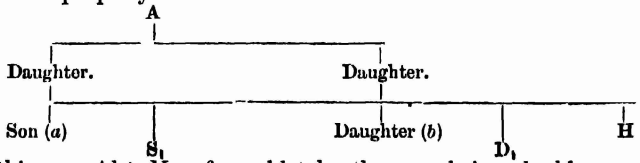
Abû Yusuf in this case would divide the property into three equal shares (regarding each daughter by both sides as equal to the son who is connected by one side only). But Mohammed would divide the property into 28 shares, out of which 22 would be given to the two daughters and 6 to the son, in the following manner :—two daughters carried to the son in the second line make four daughters, two daughters carried to the daughter on the left-hand side in the second line make two daughters, and one son carried to the daughter

[1] Imâm Mohammed is followed in India.

on the right-hand side stands as one daughter, making in all 7 shares, of which 4 shares should be given to the son in the middle in the second line ; the remaining 3 shares (there being two daughters only in the second line) would be given equally to both, that is, $\frac{3}{14}$ each.

In this way 28 shares are required to give integral shares, that is, $\frac{4}{7}$ of 28, *i.e.*, 16 to the son which comes down to the daughters, and $\frac{3}{14}$ of 28, *i.e.*, 6 again, to the daughter on the left-hand side in the second line, which also comes to the two daughters; and $\frac{3}{14}$ of 28, *i.e.* 6 to the daughter on the right-hand side in the second line, which comes to her son.

To take another case; suppose a man (A) had two daughters, both of whom died during his lifetime, one leaving a son (*a*), and the other a daughter (*b*). These two intermarried, and had one male issue (S_1). Subsequently, on the decease of her first husband (*a*), the daughter (*b*) marries H, of which union there is one female issue (D_1). Now, A dies, leaving behind him only S_1 and D_1. How is the property to be divided ?



In this case Abû Yusuf would take the son, being doubly connected, as four daughters, and divide the property *per capita*, giving to the son 4 shares, and to the daughter 1 share. But Mohammed would divide it into 6 shares, and give 5 shares to the son and 1 to the daughter, in the following way :—the son in the second line takes $\frac{2}{3}$ and passes on to his son, the daughter in the second line takes $\frac{1}{3}$, a moiety of which also she passes to her son, who thus gets $\frac{5}{6}$, and the remainder, $\frac{1}{6}$, goes to the daughter.

Uterine Relations of the second class.

With reference to the succession of the uterine relations of the second class, which comprises the excluded grandfathers and grandmothers, the succession is regulated by the following rule :—

If the claimants be equal in degree of affinity and distance, and there be none among them who is related through a sharer or residuary, or all of them be related through heirs, then, if the sex of those through whom they are related agree, and their relation be also on the same side (either through the father or the mother of the deceased), then the property would be distributed equally among them.

If, on the other hand (notwithstanding their being equal in degree), the sexes of those through whom they are related differ, then the property is distributed according to the first rank that differs in sex, as happens in the first class: that is, the division will commence in the rank or line when the difference first appears; on the principle that a male has double the portion of a female; and then the males will be grouped in one class and the females in another, and their shares passed on in the usual manner.

If, however, the relation differs, that is, the claimants be connected respectively through the mother and the father (notwithstanding equality in degree), the property is divided on the principle of double shares to the claimants connected through the father, and one share to those related by the mother: that is, two-thirds would be given to those connected by the father's side as a group, and one-third to those connected by the mother's side as a group.

The general rule. The general rule with reference to this class of distant kindred may be stated thus: If their relations are not equal then the nearest is preferred; if equal, and the sides of relationship differ, then the distribution takes place by the principle of double shares to those connected on the father's side, and one share to those connected on the mother's side; if they agree in side, that is, in strength of blood and distance, and the "roots" agree throughout in sex, then the distribution takes place according to the number of claimants; but if the "roots" differ in sex, then the property should be divided according to the difference of sex in the highest rank, as in the first class.

Distant kindred of the third class. The succession of the distant kindred of the third class, which includes sister's children, brother's daughters, and the sons of brothers by the same mother only, is also regulated by the rule that the nearest succeeds in preference to the more remote; but when all are equal in degree, the child or children of a residuary is preferred to one who is not; for example, if a man leaves a son of a sister's daughter and a daughter of a brother's son,—both equidistant from him—the whole estate goes to the daughter of the brother's son, because she is the child of a residuary, namely, the son of a brother.[1]

In the case of children of brother and sisters by the same mother only, they share equally, both males and females.[2]

[1] *Sirâjiu*, p. 45. [2] *Sirâjiu*, p. 45.

Section II.

The Doctrine of Return or Radd.

Under the Sunni Law, when there are sharers and no residuaries, the *residue* of the property, after the shares have been paid to the sharers, is divided among them under the principle of *return* in the proportion of their shares.

Return. The early lawyers were of opinion that neither a husband nor a wife was entitled to take by *return*, but later jurists have held, and so it has been decided by the British and Algerian Courts, that, when the deceased leaves no *natural* relation the husband or widow would take by *return*.

The persons to whom there may be a *return* are seven in number: (1) mother; (2) grandmother; (3) daughter; (4) son's daughter; (5) full sister; (6) half-sister by the father; (7) half-brother; or (8) sister by the mother. And a *return* may take place to one, two, or three classes at the same time. But no more than three can take by *return* at one and the same time.[1]

The residue after allotment of shares is apportioned among the parties indicated, in the proportion of their shares, *e.g.*—

When there is a grandmother and a sister by the same mother of the deceased, the shares are $\frac{1}{6}$ each; therefore the residue is divided among them equally.

When there is a daughter and mother, the shares are $\frac{1}{6}$ and $\frac{1}{2}$; therefore the residue is divided among them in proportion to their shares, which will be $\frac{1}{1\,2}$ and $\frac{3}{1\,2}$.

When there are two wives, a mother, and three daughters, the wives take between them $\frac{1}{8}$.

Mother, $\frac{1}{6}$ of $\frac{7}{8} = \frac{7}{4\,0}$.

3 daughters, $\frac{4}{6}$ of $\frac{7}{8} = \frac{7}{1\,0}$, each $= \frac{7}{3\,0}$.

L. C. D. = 240.

∴ each wife = 15, 2 wives = . 30

Mother = ... 42

Each daughter = 56, 3 daughters = 168

240

Or—Mother : daughter $= \frac{1}{6} : \frac{1}{2} = 1 : 3$.

Mother—$(\frac{1}{6} + \frac{1}{1\,2} = \frac{2+1}{12}) = \frac{1}{4}$.

Daughter—$(\frac{1}{2} + \frac{3}{1\,2} = \frac{6+3}{12}) = \frac{3}{4}$.

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[1] *Durr-ul-Mukhtâr*, pp. 868, 769.

Or—Wife, mother and daughter.

Wife = $\frac{1}{8}$.

Mother : daughter = $\frac{1}{6}$: $\frac{1}{2}$ = 1 : 3.

Mother = $\frac{1}{4}$ of $\frac{7}{8}$ = $\frac{7}{32}$.

Daughter $\frac{3}{4}$ = of $\frac{7}{8}$ = $\frac{21}{32}$.

Wife, 4 ; mother, 7 ; daughter, 21.

2 wives, 1 mother and 3 daughters.

2 wives = $\frac{1}{8}$, one wife = $\frac{1}{16}$.

Mother : 3 daughters = $\frac{1}{6}$: $\frac{3}{3}$ = 1 : 4.

When there happen to be a mother, a daughter and son's daughter, the shares are respectively $\frac{1}{6}$, $\frac{1}{2}$ and $\frac{1}{6} = \frac{5}{6}$; the residue is then divided among them in proportion to their shares, that is, $\frac{1}{30}$ to the mother, $\frac{1}{30}$ to the son's daughter, and the daughter $\frac{3}{30}$.

Or—Mother and son's daughter together take $\frac{2}{6}$.

Daughter = $\frac{3}{6}$.

∴ Mother and son's daughter :

daughter = $\frac{2}{6}$: $\frac{3}{6}$ = 2 : 3.

∴ Daughter takes $\frac{3}{5}$.

Mother and son's daughter, $\frac{2}{5}$.

And so when there is a daughter with a son's daughter.

Or, put in the way adopted by the Arabian jurists, in which instead of adding afterwards a share of the residue to the original share, the shares are originally divided among the parties as they would be taken, by way of *return*.

For example—

4 wives, $\frac{1}{8}$, each $\frac{1}{32}$.

9 daughters and 6 *true* grandmothers have $\frac{7}{8}$ between them.

To be divided in the ratio of $\frac{3}{3}$: $\frac{1}{6}$ = 4 : 1.

∴ 9 daughters = $\frac{4}{5} \times \frac{7}{8} = \frac{7}{10}$, each $\frac{7}{90}$.

∴ 6 grandmothers = $\frac{1}{5} \times \frac{7}{8} = \frac{7}{40}$, each $\frac{7}{240}$.

L. C. D. = 14,40.

Each wife 45, daughter 112, grandmother 42.

Double Inheritance or Vested Interests.

Double inheritance or vested interests.

When a deceased leaves a certain number of heirs, and one of them, before distribution takes place, happens to die leaving heirs, in such cases these heirs take under both the deceased, if they are heirs of both ; or under one of them if they are only heirs to one.

For example, a man dies leaving a son, a daughter, and a half-brother by the father. In this case the son excludes the half-brother; but before distribution the son dies leaving only the sister and his half-paternal uncle as his heirs. In this case the son's $\frac{2}{3}$ is divided equally between his sister and his uncle, the former getting half of $\frac{2}{3}$, *viz.*, $\frac{1}{3}$, and the latter the remaining $\frac{1}{3}$. This is called taking a "double inheritance."

Take another example of a more complicated character from the *Sirâjia* :—

(1) A woman dies leaving
- (*a*) A husband = $\frac{1}{4}$.
- (*b*) Daughter and mother = $\frac{1}{6} : \frac{1}{2} = 1 : 3$.
  Daughter = $\frac{3}{4}$ of $\frac{3}{4} = \frac{9}{16}$.
- (*c*) Mother = $\frac{1}{4}$ of $\frac{3}{4} = \frac{3}{16}$

(2) Husband dies leaving
- (*a*) Daughter = $\frac{9}{16} + \frac{1}{2}$ of $\frac{1}{4} = \frac{11}{16}$.
- (*b*) His wife = $\frac{1}{8}$ of $\frac{1}{4} = \frac{1}{32}$.
- (*c*) His mother = $\frac{1}{6}$ of $\frac{1}{4} = \frac{1}{24}$.
- (*d*) His father = $\frac{1}{4} - (\frac{1}{8} + \frac{1}{32} + \frac{1}{24}) = \frac{24-19}{96} = \frac{5}{96}$.

(3) Daughter dies leaving
- (*a*) Paternal grandfather = $\frac{5}{96} + \frac{1}{6}$ of $\frac{11}{16} = \frac{16}{96}$.
- (*b*) Paternal grandmother = $\frac{1}{24} + \frac{1}{6}$ of $\frac{11}{16} = \frac{15}{96}$.
- (*c*) Maternal grandmother = $\frac{3}{16} + \frac{1}{6}$ of $\frac{11}{16} = \frac{29}{96}$.
- (*d*) 2 sons (each) = $\frac{2}{5}$ of $\frac{11}{32} = \frac{11}{80}$.
- (*e*) 1 daughter = $\frac{1}{5}$ of $\frac{11}{32} = \frac{11}{160}$.

Reducing these fractions to the L. C. D.—

16, 32, 96, 80, 160

4 | 96 – 160

4 | 244 – 0

2 | 6 – 10

3 – 5

$4 \times 4 \times 2 \times 3 \times 5 = 480$

Mother of the original deceased, that is, maternal grandmother of the last deceased = $\frac{29}{96}$ of 480 = 145.
Father's wife = $\frac{1}{32}$ of 480 = 15.
Father's mother = $\frac{15}{96}$ of 480 = 75.
Father's father = $\frac{16}{96} \times 480 = 80$.
Sons, $\frac{11}{80}$ each = 132.
Daughter, $\frac{11}{160}$ = 33.
Total 480.

The Doctrine of Increase.

Increase. It sometimes happens in practice that when there are several sharers co-existing, their fractional shares when added up amount to a great deal more than the integral quantity. In order to meet

the difficulty thus arising, the Sunni lawyers make a proportionate abatement in all the shares by increasing the common divisor. This is called *Aul* "increase;" *Aul* is thus a technical expression used by Sunni lawyers to signify a proportionate increase in the common divisor for the purpose of yielding the requisite number of shares. For example, if a woman leave behind her a husband, two daughters, and a mother, their respective shares would be one-fourth, two-thirds, and one sixth.

The common divisor in this case is twelve, which represents the shares into which the estate will have to be divided, three being the husband's share, eight the daughter's, and two the mother's. But three, two, and eight make thirteen. The Sunnis, accordingly, in order to give the exact number of shares to each heir, divide the property into thirteen shares.

The Shiah doctrine.

Among the Shiahs this arbitrary division of the property is not recognised. On the contrary, when they find that the property falls short in distribution of all the appointed shares, the deficiency falls upon the heir or heirs whose share or right is liable to fluctuation or variation. For example, in the above case the mother and husband would get, among the Shiahs, their full shares, without any abatement, and the remainder, *viz.*, seven-twelfths, would be given to the daughters in equal proportion.

Section III.

Posthumous Children, etc.

A widow's period of probation or *iddat*.

When a person dies leaving a widow, she is prohibited from marrying before the expiration of four months and ten days. This is called the *iddat* or probation of widowhood, and is prescribed for discovering whether she is *enceinte* or not. If she is, her probation will not terminate until she is delivered. If a child is born within the ordinary period of probation, *viz.*, two years,[1] it would succeed to its father. Where a child is born after the decease of any other relation to whose inheritance it would have been entitled had it been in existence at the time of such relation's death, it will succeed only if born within six months from such death, unless the

[1] See, however, Chapter on Legitimacy.

other heirs acknowledge that the child's mother was pregnant when the deceased person died.

Posthumous children.

A child in the womb may belong to the category of (1) those who totally or (2) those who partially exclude the other heirs, or (3) those who participate with them. If he be a total excluder of all the heirs, as (for instance a son,) the other heirs, being brothers or sisters or paternal uncles, the whole of the estate must be reserved to abide the event of his birth. When only some of the heirs are excluded, as when there is a grandmother, and a brother, the grandmother's sixth is to be paid to her, and the remainder of the estate reserved. If the child be only a partial excluder, as when there is a husband or a wife besides him, the smaller of the shares to which the party may be entitled is to be paid to him or her, and the remainder is to be retained.

And when the heirs are persons who are not subject to partial exclusion, as a grandfather, or grandmother, their full shares are to be paid to them, and the remainder is to be retained.

If the child is only a participator with the other heirs, and neither a total nor a partial excluder, as when the deceased has left sons and daughters and a pregnant widow, the share of one son is to be reserved.

If the child is born dead he does not inherit, and there is no other legal effect or consequence. The signs of life are breathing, making a sound, sneezing, crying, laughing and motion, as of the eyes or hands.

If half of the child is protruded, and it then dies, it is entitled to inherit, but not if less than half be protruded. When the head is presented, and the breast is protruded while the child is still living, it inherits ; but if the feet are presented, regard is to be had to the navel.

When a child is born dead it does not inherit as already mentioned, but this is to be understood of a regular delivery ; and "if violence has been done to the mother, as, for instance, if she has been struck on the belly and has cast her progeny, such progeny is to be regarded as one of the heirs. For the law imposes a liability on the striker, and liability is incurred only for an offence against the living, not against the dead. When, therefore, we presume the child to have been alive, he is entitled to his share in the inheritance, and the share can be inherited from him, in the same way as the exchange for his life is inherited from him, and that is the fine."

Persons dying together, in a common calamity.

Persons dying in a sudden calamity are supposed to have died together, so that they do not inherit to each other, but the property of each goes to his or her respective heirs, unless it is known in what order they died, when those who died last will inherit to those who died before them.

Missing persons.

Under the old Hanafî Law missing persons were supposed to be alive for 90 years. But the more reasonable principle of the Mâliki Law is now in force among the Hanafîs, *viz.*, that if a person be unheard of for four years he is to be presumed to be dead.

The same principle is in force among the Shiahs. Among the Shâfeïs the recognised period is seven years.

Among the Hanafîs, a missing person or *Mafkûd-ul-khabar* is "considered alive during this period so far as regards his own property, but dead as regards the property of others." On the expiration of this period, "he is to be accounted dead with respect to his own property and with respect to the property of others, as if he had died on the day of his being missing."

A captive is subject to the same rules as other Moslems in respect of inheritance unless he renounces his religion, and if he renounces it, he is subject to the same rules as apostates. If it is not known whether he has renounced his religion, or whether he is dead or alive, he is subject to the same rules as missing persons.

When a person has died to whom one who is missing is an heir, his share is to be reserved "until his state be determined, on account of the possibility of his being alive"; and when the time has arrived which has been above indicated, his own property is to be divided among those of his heirs who are then alive; but what was reserved for him from the estates of other persons is to be returned to the heirs of such persons, as if the missing person had never been.

Agreement before marriage relinquishing rights of inheritance void.

An agreement entered into before marriage that the parties shall have no right of inheritance to each other, or that the husband shall not take a share in the inheritance of the wife in case she predeceased him or *vice versâ* is void; and the right will accrue under the law.[1] But the husband or wife may renounce the right *after* it has accrued.

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[1] *Fatâwa Kâzi Khân.*

Section IV.

Walâ.

As regards the right of inheritance founded on *walâ*,[1] there is great divergence between the schools.

Walâ-ul-itk. The Hanafîs recognise two kinds of *walâ*, *viz.*, *walâ-ul-itk*, "the right of inheritance acquired by emancipation," and the *walâ-ul-mawâlât*, "the right of inheritance by clientage." The Shiahs recognise three kinds of *walâ*, two of which are analagous to those recognised by the Sunnis; but whilst the Shiahs postpone the right of succession of the emancipator until after the blood-relations are all exhausted, the Sunnis give the preference to the emancipator over the uterine relations of the deceased. For example, if a man enfranchise his slave, and that slave die subsequently leaving certain heirs belonging to the class of uterine relations, the emancipator would exclude such relations, under the Sunni Law. "By the *walâ* of manumission," says the *Hedâya*, "*asûbat* is established; in other words, when a person emancipates his slave, he is *Asabâh* to such slave, and is entitled to inherit of him in preference to his maternal uncles or aunts or other uterine kindred."[2]

Emancipator. The emancipator is accordingly styled in Sunni Law "a residuary for special cause." In the absence of the manumittor, his male, but not the female, residuary heirs succeed to the deceased freedman. Females succeed, however, when they themselves have manumitted the slave. If the deceased freedman leave no sharer or residuary by blood, his entire estate goes to the *Asabâh* by *walâ* (the emancipator or his *male* residuary heirs), to the absolute exclusion of the deceased's uterine relations. If he leave a sharer, then the specified share is allotted to such sharer, and the residue goes to the residuary by *walâ*; but if he leave a residuary by blood, then the latter takes nothing.

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[1] "*Walâ*," says the *Hedâya*, "literally means friendship and assistance, but in the language of the law it signifies that assistance which is a cause of inheritance." It means, in fact, the peculiar and artificial relationship which in a state of society like that of the Arabs, came into existence when the master freed his slave, or when one person made himself the *client* of another, in both of which cases it was the duty of the parties to help each other; the master in one case and the patron in the other continuing liable for the *Diat* (blood-money, *wehr-geld*) of the freedman or client.

[2] *Hedâya*, Bk. xxiii.

Whilst the Shiah Law restricts the right of inheritance by *walâ* exclusively to those cases where the emancipation has been granted voluntarily or as an act of charity, the Hanafî branch of the Sunni Law recognises no such restriction. For example, according to the *Sharîfia*, "the manumittor inherits from the manumitted in general, whether he manumitted for the sake of God or for the sake of Satan, or upon the condition of continuing under the manumittor's control, or upon the condition of not taking his *walâ*, or upon the condition of his giving or not giving some property, or as a *mukâtib*, or for other causes." So that whether the emancipation be for evil purposes or as an act of charity, whether it be sold to the emancipated or granted to him freely, the emancipator is always entitled to succeed to the inheritance of the emancipated, in case he dies without leaving residuaries by blood. Even if the right of *walâ* was expressly abandoned at the time when emancipation was granted, it would not interfere with the emancipator's right of succession. The Mâlikîs agree with the Shiahs in holding that in case of manumission for an evil purpose, or when the manumittor has renounced his claim by *walâ*, he has no title to succeed to the inheritance of the deceased freedman. The Mâlikîs and the Shiahs.

The emancipated slave is under no circumstance entitled to the inheritance of the emancipator.

But in the succession of the manumittor and his male residuaries to the emancipated slave, a variation is made by the Sunnis in the recognised order of succession. For example, in ordinary cases, when a man dies leaving behind him a son and a father, the father takes his specified share, *viz.* one-sixth, and the son takes the residue; but if a freedman were to die leaving behind no *Asabâh* by blood, but only his manumittor's son and father, the son of the emancipator would take the whole inheritance to the exclusion of the father.[1] So, also, in the case of the manumittor's son co-existing with a grandfather. The general principle is that in the succession of "residuaries for special cause," the nearest takes the whole in preference to the one more remote (as an agnate).

Under the Sunni Law, therefore, if a freedman leave a wife, a daughter's son, and his manumittor's son, the wife takes her specified share, and the residue goes to the emancipator's son as a

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[1] *Hedâya*, Bk. xxiii.

"residuary for special cause" to the total exclusion of the freedman's grandson. The right of persons by virtue of the *walâ-ul-mawâlât* (by clientage), however, is postponed until all other heirs are exhausted. The *mawla-ûl-mawâlât* (the patron) accordingly does not exclude the uterine relations as happens in the case of the *walî-ul-itk*, co-existing with the *Zav-il-Arhâm*. The Shâfeïs regard this form of *walâ* as implying a fraud on the *Bait-ul-Mâl* or public treasury (for the benefit of all the Mussulmans) and consequently consider it illegal and invalid.

Walâ-ul-mawâlât.

The subject of *walâ*, however, has now only an antiquarian interest. Section 3 of Act V of 1843 has removed all bar to the succession of the natural heirs of an emancipated slave to his or her inheritance. And in the case of *Sayad Mir Syanuddin Khan* v. *Zia-ul-Nissa Begum*[1] the Privy Council declared in effect that the right of inheritance created by the relationship of *walâ* to the exclusion of the emancipated slaves' natural heirs was done away with by that Act. The result of that Statute is that the distant kindred (cognates) of a person, who was a slave at one time but was emancipated afterwards, take their natural place in the order of succession.

Section V.

Miscellaneous Examples.

When the father exists by himself, he takes the entire inheritance.

When the mother exists by herself, she takes the whole inheritance: one-third as her appointed share, and the remainder by right of *return*.

When the father and the mother exist together, the mother takes one-third, and the father takes the remainder.

When the deceased leaves behind him a father, a mother, and two brothers (or one brother and two sisters, or four sisters) the mother takes one-sixth, and the father takes the remainder, to the total exclusion of the brothers.

If the father and mother exist with children, the father and mother take one-sixth each.

When there is only one son, he takes the entire inheritance.

[1] L. R., 6 I. A., p. 132.

If there are several sons, they divide the inheritance equally among themselves.

When there is only one daughter, and no residuary, she takes the inheritance: half as her appointed share, and the remainder by right of *return*.

If there are two or more, they take the entire inheritance equally, two-thirds as their appointed share, and one-third by right of *return*.

When the two ascendants, or either of them, are coexisting with the descendants, then each of the ascendants receives one-sixth, and the remainder is distributed among the descendants equally if they be all males; but if there be a female or females among them, then each male has the portion of two females.

When a husband or wife of the deceased, co-exists with the parents and the children, then the husband or the wife takes his or her reduced share,[1] and the parents theirs, while the remainder goes to the children.

When there are the two ascendants and a daughter, the ascendants receive their one-sixth respectively and the daughter her moiety, and the residue is given to the father.

When the two parents co-exist with one daughter and a consanguine brother, the parents take their respective shares, *viz.*, one-sixth, the daughter her moiety, and the remainder is given to the father.

When the two ascendants co-exist with a daughter and the husband, there would be a proportionate abatement in the shares. For example, the share of a husband, is one-fourth, that of the parents, one-sixth each, and of the daughter, one-half, total, 13; and, accordingly, instead of getting three-twelfths, the husband gets three-thirteenths, the daughter six-thirteenths, and the parents two-thirteenths each. In case of the deceased being a male leaving a a wife behind co-existing with the daughter and the parents, the father would take the entire residue.

If the deceased leave surviving her, her husband and the two ascendants (parents), the husband takes his half, the mother one-third of the remainder and the father the remainder.

The lineal male descendants exclude from succession everyone connected with the deceased through them, and also everyone

[1] Viz. ¼ or ⅓.

connected through the deceased's parents, but not the parents themselves. For example, they (the male children) exclude the deceased's brothers and their children, his grandparents and their ancestors, his paternal and maternal uncles and aunts and their children.

Under the Sunni Law, if the deceased leave behind him a daughter and a predeceased son's son, then the daughter takes her moiety, and the residue goes to the grandson.

But if, instead of a son's son, there were only son's daughters, then these would take one-sixth equally among themselves. If, however, there were two or more daughters, the son's daughters would take nothing. But if there happened to be with the son's daughters a son's son also, then the daughters would take their two-thirds, and the remaining one-third would be divided among the grandchildren in the proportion of two for each male and one for each female. A son, however, would exclude *in toto* the sons and daughters of a predeceased son.

Under the Sunni Law, a daughter's daughter, as an uterine relation, has no place in the inheritance until all heirs with a residuary title are exhausted. For example, a father would exclude entirely, under the Sunni Law, a daughter's daughter.

If there be only one full brother, he takes the entire inheritance ; when there are several, they divide the inheritance equally among themselves.

If there be sisters with the brothers, the brothers take two shares each, and the sisters one each.

If there are two or more uterine brothers or sisters co-existing with full brothers and sisters, the former receive one-third, which is divided equaally among them without distinction of sex, whilst the full brothers and sisters take the remainder in accordance with the general principle.

When there are no full brothers and sisters, then consanguine brothersand sisters take their places.

The paternal or maternal grandfather, if alone, without any co-heir, takes the entire inheritance ; so does the grandmother.

When there are ancestors of the paternal as well as of the maternal line, the former, without distinction of sex, take the entire inheritance.

The paternal grandfather and grandmother share in the succes-

sion according to the general principle of two shares for each male and one share for each female.

When the deceased leaves surviving only a maternal grandfather and maternal grandmother, the latter takes the entire inheritance.

When there are uterine brothers or sisters co-existing either with a maternal grandfather and a maternal grandmother, they receive one-third among them, the remainder going to the grandmother. If there is only one uterine brother, he receives one-sixth.

When there is a half-brother by the same mother only and the son of a full brother, the half-brother gets one-sixth, and the remainder goes to the son of the full brother.

When the deceased leaves nephews and nieces, consisting of the children of brothers and sisters, the children of sisters being uterine relations do not succeed until the agnates are exhausted.

When there are paternal uncles and aunts, the entire inheritance goes to the paternal uncles, to the exclusion of the paternal aunts.

When there are uncles and aunts, some of whom are the deceased's father's half-brothers and sisters on the mother's side, and some are of the full blood, the uncles who have the same father and mother as the father of the deceased, or who have the same father, that is, the full brothers and consanguine brothers of the deceased's father, exclude all other relations from the succession.

A divorcée.

If a woman be divorced by a husband during an illness from which he does not recover, and which eventually causes his death, her right to a share in his inheritance continues until the expiration of her *iddat*, or period of probation, so that if the husband died within that time she would succeed, but if he recovered during that interval and died either of the same disease or any other complaint, she would not succeed.

Minors contracted in marriage by their guardians.

Minors contracted in marriage to each other by their fathers or paternal grandfathers have a mutual right of inheritance. But if the contract were entered into by guardians other than the fathers or paternal grandfathers, then the marriage remains in suspense until assented to or ratified by the parties on attaining majority,[1] and if one of them should die in the interval before the ratification of the contract, the survivor would have a right of inheritance.

[1] See *seq.*

Neither the step-mother, nor the step-daughter has any right in the inheritance of a deceased person.

When a person has died leaving him surviving a paternal half-uncle, a mother and a grandmother (father's mother) one-third will go to the mother, and two-thirds to the paternal half-uncle, the grandmother being excluded. If there were several paternal half-uncles, they will take the two-thirds among them.

A has a son B, who dies in the lifetime of A, leaving a son D. Afterwards A dies leaving him surviving C, his daughter, and D. Previous to partition C dies leaving two daughters, E and F. Under such circumstances C having become entitled to one-half as daughter, that share would go to her daughters E and F as well as to the nephew D; that is, two-thirds of the half will go to E and F in equal moieties, and the remaining third to D, who will also get the remaining half of the original estate, *e.g.*—

On the death of A,

$C = \frac{1}{2}$

$D = \frac{1}{2}$

On C's death, E and F $= \frac{2}{3}$ of $\frac{1}{2} = \frac{1}{3}$

$D = \frac{1}{2} + \frac{1}{3} \times \frac{1}{2} = \frac{1}{2} + \frac{1}{6} = \frac{4}{6}$.

A man dies leaving a mother, paternal half-grand-uncles and the daughters of a paternal grand-uncle. In this case, the mother takes her legal share, and the residue is given to the paternal half-grand-uncles, the daughters of the paternal grand-uncle not taking anything as they are *Zav-il-Arhâm*.

A person dies leaving two sisters and a daughter of a predeceased son. In this case, the grand-daughter would take a moiety, and the sisters the remaining moiety.

A woman dies leaving her surviving a husband, a daughter and a paternal uncle. In this case, the husband takes his $\frac{1}{4}$, the daughter $\frac{1}{2}$, and the paternal uncle the residue.

A man dies leaving him surviving a grandson and grand-daughter by a predeceased daughter. At the time of his death, the grandson is in a foreign country, and for a considerable time is *mafkûd-ul-khabar*, and no news is received of him. The grand-daughter then dies leaving a son, a daughter and a husband. After her, the husband of the daughter dies. In such a case the property will be divided into three shares, of which his grandson will obtain two shares, and his grand-daughter one. The husband of the daughter and the husband of the daughter's daughter are not entitled to any share.

An absentee, concerning whose place of abode, death, or existence, no tidings can be learnt, is, as regards his own property, alive, and as regards that of others, defunct. The ruling power should appoint some one to take charge of his affairs, and his portion should be reserved for the usual period now recognised.

Any of his relations who died in this *interim* will not participate in his property. Supposing the grand-daughter to die, leaving a son, a daughter and a husband, her property will be made into four parts, and distributed among her heirs in the following manner :—

One share will go to her husband, two to her son, and one to her daughter ; and if the original proprietor's son-in-law died possessing property distinct from that of such proprietor, it will devolve on his son.

A man dies leaving two daughters, a son's son and a daughter of a son. In such a case after the discharge of the legal liabilities attaching to the estate of the deceased, the partition will be effected thus :

Daughters $= \frac{2}{3}$

Son's son and son's daughter (as residuaries) $= \frac{1}{3}$

Son's son $= \frac{2}{3} \times \frac{1}{3} = \frac{2}{9}$

Son's daughter $= \frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$.

When the deceased leaves a mother, three sisters, a brother, and a widow—the division will be thus :—

widow $= \frac{1}{4}$

mother $= \frac{1}{6}$

brother and sisters (as residuaries) $= \frac{14}{24}$

brother $= \frac{2}{5} \times \frac{14}{42} = \frac{14}{60}$

each sister $= \frac{1}{5} \times \frac{14}{24} = \frac{7}{60}$.

When the deceased leaves four daughters, a brother, two sisters and a widow, the division will be thus :—

widow $= \frac{1}{8}$

daughters $= \frac{2}{3}$

brother and sisters $= \frac{5}{24}$

brother $= \frac{2}{4} \times \frac{5}{24} = \frac{10}{96}$

each sister $= \frac{1}{4} \times \frac{5}{24} = \frac{5}{96}$.

When the deceased leaves a widow, an uterine sister and four nephews (brother's sons) the division will be thus :—

widow $= \frac{1}{4}$

sister $= \frac{1}{2}$

nephews (as residuaries) $= \frac{1}{4}$

When a woman dies leaving a daughter, a mother, a father, and a husband, the division will be thus by increasing the denominator to 13 :—

husband	$=\frac{1}{4}=\frac{3}{13}$
mother	$=\frac{1}{6}=\frac{2}{13}$
daughter	$=\frac{1}{2}=\frac{6}{13}$
father	$=\frac{1}{6}=\frac{2}{13}$.

A person dies leaving an uterine sister and a half-sister by the same father. The division will be thus :—

uterine sister	$=\frac{1}{6}$
consanguine sister	$=\frac{1}{2}$.

Remainder to be *returned* to them *pro rata*.

Hence the shares will be $\frac{1}{4}$ and $\frac{3}{4}$ respectively.

A man dies leaving a widow, a mother, a son, and a brother. The division will be as follows :—

widow	$=\frac{1}{8}$
mother	$=\frac{1}{6}$
son $=\frac{24}{48}$. Total	$=\frac{48}{48}$.

The brother is excluded.

If the son dies, his inheritance will be thus :—

His mother (widow of the original deceased)

	$=\frac{1}{3}\times\frac{24}{48}=\frac{17}{72}$
The uncle, the residue	$=\frac{24}{48}-\frac{17}{72}=\frac{34}{72}$.
Hence the widow of the original proprietor gets	$=\frac{1}{8}\times\frac{17}{72}=\frac{29}{72}$
mother	$=\frac{1}{7}\frac{2}{2}$
brother	$=\frac{34}{72}$.

A woman dies leaving a husband, a daughter, a brother and three sisters. The division in this case will be as follows :—

husband	$=\frac{1}{4}$
daughter	$=\frac{1}{2}$
brother	$=\frac{2}{20}$
each sister	$=\frac{1}{20}$.

A man dies leaving a wife, a mother, three sisters of the full blood, one sister of the half-blood, and two brothers of the half-blood. The division in this case will be as follows :—

widow	$=\frac{1}{4}$
mother	$=\frac{1}{6}$
three sisters	$=\frac{8}{3}$; but $\frac{3+2+8}{12}=1\frac{3}{12}$

∴ Increase divisor to 13, which gives 3 shares to widow, 2 shares to mother, and the residue to the sisters : but as 8 cannot be divided equally among the three sisters, increase divisor to 39.

thus widow $= \frac{9}{39}$
mother $= \frac{6}{39}$
each sister $= \frac{8}{39}$.

A person dies leaving a mother, an uterine sister and a consanguine sister. In such a case—

the mother takes $= \frac{1}{6}$
the uterine sister $= \frac{1}{6}$
the consanguine sister $= \frac{1}{2}$.

The remainder is *returned* to them in the same proportion.

In other words, the shares would be as follows :—

the mother $= \frac{1}{5}$
the uterine sister $= \frac{1}{5}$
the consanguine sister $= \frac{3}{5}$

Exclusion.

Exclusion is said to be of two kinds—*partial* and *total*. The former though called *exclusion* is in reality a reduction of the share receivable by one heir from the fact of co-existence with another heir. Exclusion. Partial.

As already stated, six persons can never be excluded from inheritance, *viz.*, the father, the son, the husband, the mother, the daughter, the wife.

Among residuaries the nearer always excludes the more remote. But a nearer residuary does not always exclude a more remote sharer, *e.g.*, a mother's mother is not excluded by a father, nor does a nearer sharer exclude a more remote residuary, nor even a more remote sharer, unless the right of succession is founded on the same relationship as in the case of a mother and a grandmother, or a daughter and a son's daughter.

Full brothers and sisters are excluded by a son, son's son and a father, and by a grandfather also, with some difference of opinion.

Half-brothers and sisters on the father's side are excluded by the same persons, and also by full brothers and sisters ; and half-brothers and sisters on the mother's side are excluded by a child, the child of a son, a father and a grandfather. All grandmothers, whether maternal or paternal, are excluded by a mother ; and paternal

grandmothers are excluded by a father, as a grandfather is excluded by him, and they are also excluded by a grandfather when anterior to him; but a paternal grandmother is not excluded by a grandfather, because she is not anterior to him.

Grandmothers on the side of the mother are not excluded by a father; so that if one should leave a father, a father's mother, and a mother's mother, the father's mother is excluded by the father; but there are different opinions as to the mother's mother, some saying that she has a sixth, and whilst others hold that she has only the half of a sixth.

The nearer excludes the more remote, whether himself an heir or excluded. Thus, if one should leave a father, a father's mother, and the mother of a mother's mother, it is said that the father has the whole, because he excludes his mother, and she excludes the mother of the mother's mother, because she is nearer to the deceased. There is a difference of opinion about her right of succession along with her son, *viz.*, the paternal uncle to the deceased; but, according to the generality of 'our sheikhs,' she does not inherit with her son, *viz.* the paternal uncle.

It should be remembered that only one grandmother on the side of a mother can be considered an heir, for *true* grandmothers are only those in whose line of relationship a father does not come between two mothers; so that this single heir is the mother's mother how high soever, and the nearer excludes the more remote, so that only one grandmother can inherit. But among paternal grandmothers many may be heirs.

The circumstances which tend to exclude a person from inheritance either wholly or partially rest on the fact of his or her co-existing with some other preferentially entitled. The death of the latter would remove the cause of exclusion.

Total disqualification.

But there are certain causes which disqualify a person from inheriting altogether. These causes are (1) denial of the unity of God and the messengership of the Prophet; (2) homicide (*viz.*, the killing by the claimant of the person whose inheritance he claims); and (3) slavery.

These causes, however, whilst they disqualify the person affected by them from succeeding do not exclude others. For example, if A, dies leaving B, his son, and C, B.'s son, and B happens to be a slave, B will be disqualified, but C will not be affected thereby, and will be entitled to succeed to the inheritance of his grandfather. This,

it will be seen, is different from what is called exclusion; *e.g.*, two or more brothers or sisters either full or half, and on whatever side, though they do not inherit themselves, when there is a father, yet reduce the mother's share from a third to a sixth.

"*Denial*" or *Kufr*.

The first cause which precludes a person from inheriting is *kufr*[1] (infidelity). *Kufr* means the *denial* of the unity of God (*wahdânièt*) and of Mohammed's messengership (*risâlat*), the two cardinal principles on which Islâm is founded. Every person who acknowledges divine unity and the messengership of the Arabian Prophet is regarded as within the pale of Islâm; nothing more is required. Those, however, who deny these cardinal principles are considered beyond the benefit of its rules. Accordingly, when a person dies leaving an heir who by birth or apostasy is a "denier," *i.e.*, repudiates God's unity and Mohammed's ministry, such heir would be excluded from succession in preference to another who does accept those doctrines. Consequently, those who profess a different faith from Islâm have no title to the inheritance of a deceased Mussulman. So, that if a Mussulman die leaving behind him an heir who does not profess the Islâmic faith, he is debarred from inheriting, even though he be nearest to the deceased. For example, if a man die leaving behind him a son who is a non-Moslem, and a grandson who is a Moslem, the son would be evicted from the succession, and the grandson would take the inheritance to the absolute exclusion of his own father.[2]

The Indian Act XXI of 1850 has made a variation in the Mahommedan Law of Inheritance. The principle by which non-

[1] A believer in God or Theist who, although he does not call himself a Mussulman, yet accepts Mohammed as one of the veritable "messengers of God," can hardly be designated a *kâfir*. Many Moslem divines regarded Ram Mohun Roy as a Moslem—certainly not a *kâfir*. Islâm depends on the acceptance of the two doctrines mentioned in the text. The recognition of sectarian dogmas is a matter of detail. And hence whilst the ultra-Sunni regards a Shiah as a Moslem, he does not consider him a *Momin*-(one having *Imân* or Faith), and *vice versâ*.

[2] These provisions do not owe their origin to religious exclusiveness, but to the political necessities of the early Commonwealth, when a "denier" was an inveterate enemy, and an "apostate," a traitor. They have their counterpart in Christian communities. In Russia, even now a convert from the orthodox church is debarred from the rights of inheritance.

Moslems were excluded from the inheritance applied equally to those who were born in a different faith, and those who abjured Islâm.

For example, an apostate from Islâm and an original non-Moslem came equally within the purview of this rule, so that if a deceased Moslem left behind him three heirs, one of whom was a non-Moslem, the other an apostate, and the third a Moslem, the first two, under the Mahommedan Law, would be excluded absolutely from the succession, and the inheritance would go entirely to the Moslem heir, though he may be remotest of all of those in the degree of proximity to the deceased. The change effected by Act XXI of 1850 is most important.

This Act consists of only one section, but its operation has had the effect of diverting entirely in many cases the course of succession from the channel into which it would have otherwise run. It enacts that "so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts established by Royal Charter within the said territories."

The effect of this enactment has been to do away with the provision of the Mahommedan Law by which apostates were excluded from the inheritance of deceased Moslems. But the prohibition against the succession of original non-Moslems remains intact. So that, if an apostate were to die leaving children brought up in his or her own creed, they would have no right of succession to the inheritance of their Moslem relation, though had their apostate parent been alive, he or she would have been entitled under the Act to succeed.

If the apostate die after the inheritance has opened up, and the right of succession has vested in him, then the succession of his own children, though non-Moslems, would not be prevented by the evicting provision of the Mahommedan Law.

Under the Sunni Law, a Moslem does not inherit from a non-Moslem, nor does a non-Moslem inherit from a Moslem.[8]

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[8] *Fatâwâ Alamgiri*, Vol. VI, p. 631.

When either of the parents is a Moslem, the law presumes the child to be a Moslem (until it is able to make a choice), and the right to its succession is regulated by the Laws of Islâm.

The Moslems inherit from each other though they may belong to different sects.

Among the Hanafîs, in the case of a male apostate, a distinction is made regarding the time when the property was acquired.

For example, if the property was acquired before apostasy, it goes to the Moslem heirs, but if it was gained subsequent to the apostasy, then it escheats to the *Bait-ul-Mâl*. In the same way, the portion which was acquired before apostasy goes to the Moslem heirs, and the portion acquired afterwards goes to the *Bait-ul-Mâl*. This is the view of Abû Hanîfa, and the principle laid down by him is followed in most Mahommedan countries. But Abû Yusuf and Mohammed differ from Abû Hanîfa on this point, and agree with the Shiahs in holding that the entire estate of an apostate descends to his Moslem heirs.[1] In the case of a female apostate, however, her entire property, whether acquired before or after apostasy), goes to her Mussulman heirs.[2]

Difference of country involving difference of allegiance is also a bar to succession under the Sunni Law; but this is confined to non-Moslems only. Moslems, among themselves, though owning different allegiance, succeed to each other. The Mussulman sovereigns, however, by special treaty regulations, have granted to the subjects of non-Mahommedan powers the privilege of acquiring property by inheritance in Mahommedan countries. Difference of country.

Homicide.

Among the Hanafîs, homicide, intentional or unintentional, invariably excludes from inheritance. An act, however, committed by an infant or an insane person which causes death, does not exclude such infant or such insane person from succeeding to the estate of the deceased. Or, if a person were to kill another in justifiable war, or when inflicting punishment under the direction of the law, such person would not be excluded from the inheritance of the killed. Homicide.

Being the indirect cause of a person's death without any intention

[1] Compare Phear, J., in the matter of the application of Zynab Bibi, September 1876, unreported.

[2] *Sirâjia*, p. 58; *Futâwa Alamgiri*, Vol. VI, p. 633.

is not a sufficient ground for excluding from his inheritance ; as, for instance, when a person has dug a well into which another falls, or placed a stone on the road against which he stumbles and is killed in consequence.

Any act committed by one person which causes the death of another leads to the forfeiture by the former of his right of inheritance to the latter, if the act is such as would render him punishable or subject him to an expiation under the Mussulman Law. Anything that does not render him punishable either by retaliation, *Kisâs*, or expiation is regarded merely as an indirect cause. "When a father," says the *Alamgiri*, "circumcises his child, and the child dies in consequence of the operation, the father is not deprived of his right in the child's inheritance."

"But if he should admonish him by stripes, and the child should die in consequence, he is responsible for the *diat* or fine, and loses his right to inherit, according to Abû Hanîfa, though he is not responsible, according to the other two. This is the adopted doctrine. And if a teacher be the person who punished the child, with the father's permission, he does not incur any liability, according to all their opinions."

Section VI.

The Mafkud or Missing Person.

The *Mafkûd*.

The *Mafkûd* is a person regarding whom it is not known whether he is dead or alive. In the *Muhît* it is stated that if a Moslem be captured by an enemy, and it be not known whether he is dead or alive, though it be known that he is a captive in the *Dâr-ul-Harb*, he would be designated a *Mafkûd*. But in the *Multeka* and other authorities it is clearly laid down, that in order to be designated a *Mafkûd* the place where he is abiding should also be unknown. The author of the *Radd-ul-Muhtâr* observes that a knowledge of the place of abode involves a knowledge of the missing person being alive, for if it be not known where he is living, it follows that the other fact would also be unknown.

When a person who is missing has left his property in the hands of an agent, neither the officer in charge of the *Bait-ul-Mâl*, (even when he has no heir,) nor the Kâzi can take the property away from that person. The latter can only do so if he is satisfied that the

agent is destroying, or, is likely to destroy the property, or to embezzle it. This also is the rule laid down by Mufti Abû Saood in his Ordinances (*Maaruzât*).

When the missing person has expressly authorised his agent to recover his debts by suit, according to Abû Hanîfa he can do so, but not otherwise.

If the missing person has left no agent, the Kâzi may appoint some one to take care of the property. But there is a difference of opinion regarding the Kâzi's power to authorise the agent to recover by suit the missing man's debts. In the *Khulâsa*, however, it is stated that if he be a *Mujtahid* Kâzi,[1] the authorisation is lawful. The *Mafkûd's* agent.

The Kâzi is not authorised to sell any property of the missing person excepting such as is likely to be lost or damaged or to deteriorate in any way. In the latter case he is to keep the proceeds in deposit. But he can out of such proceeds pay for the maintenance of the missing man's family.

If a person purchases some property, but before delivery of possession becomes a *Mafkûd*, in such a case if the property be moveable the Kâzi can sell it and pay with the proceeds its price to the original vendor. But not if the property be *akâr*.

When a thing has been pledged by one person to another and, after such pledge the pledgor has become a *Mafkûd*, the pledgee cannot sell it for the discharge of his debt, without an order of the Kâzi.

When the Kâzi has appointed an *Amîn* or trustee for the goods and property of a missing person, such trustee will pay out of the available property of the *Mafkûd* the maintenance of his family, his family meaning his wife and his children, and his parents if they are in want.

According to Imâm Mâlik, the wife of a missing person is entitled to observe the *iddat* of death on the expiration of four years from the date of his disappearance. In other words, his death would be presumed on the lapse of four years, and after observing the usual probation of four months and ten days prescribed as the period of *iddat* in case of the husband's death, she would be entitled to re-marry. Imâm Shâfeï held the same opinion originally. Mâlik's doctrine.

[1] Chief Kâzi

But as regards the partition of the missing man's property they agree with "us" (Hanafîs) that it should be kept for 90 years, or *until the Kâzi pronounces his judgment.*

Imâm Ahmed (ibn Hanbal) says that when there is a strong presumption of death, the property should be divided among the heirs, just as the widow should be allowed to observe the *iddat* of death after four years. For example, if a man is missing from the ranks of two fighting bodies, or from a ship which is wrecked, &c., the presumption is that he is killed or drowned. In such cases, the property should be divided after four years from the date of the accident, and his wife should observe her *iddat.* But when no such presumption arises, *e.g.*, when a man has gone travelling on trade and has not been heard of, Imâm Ahmed says, recourse must be had to the *Hâkim* to pronounce his judgment.

Fatwa according to Mâlik.

In the *Bazâzia* it is stated that "in our times," the *Fatwa* is according to the rule of Imâm Mâlik. And the author of the *Radd-ul-Muhtâr* adds, following Mufti Abû Saood, "where there is no Mâliki Kâzi, the Hanafî Kâzi is authorised to pronounce the *Fatwa* according to the exigencies of the moment in conformity with the rule of Imâm Mâlik."

Imâm Mâlik's rule is based upon a decision of the Caliph Omar in accordance with the opinion of the Caliph Ali.

If a person die leaving two daughters, and the children of a son who is missing at the time of his death, in such a case if the property be in the hands of the daughters, they will be regarded as holding their brother's share in trust for him. If he should appear, a half will be given to him. If he be found to be dead his half would be divided among his children in the proportion of two shares to a male and one share to a female.

If a person die leaving a legacy in favour of another who is missing, the legacy will be kept in abeyance until it is ascertained whether he is dead or alive, as in the case of a partition of inheritance.

There is great difference of opinion as to the period during which the share of a missing person should be held for him; some have said 90 years; others 70, whilst "moderns" generally have fixed 60 years. But the general conclusion as laid down in the *Fath-ul-Kadîr* is that the Judge may give any direction having regard to the circumstances of any particular case, as to the probability of

the missing person's death, and the period for which the partition should be delayed.

The decision of the Kâzi must be obtained with regard to the death of a missing person. Should he appear alive after the declaration of the death, he would not be entitled to take a share in any inheritance *which has opened since the declaration.*

If the wife of the missing man re-marries after waiting for four years and after observing the usual *iddat*, and he appears, the wife would be "for him," whilst any children born to her by her second husband would belong to the latter.

When a declaration of death is made regarding a missing person, the right to succeed to him will accrue from that date and not from the time when he has disappeared.

Should he reappear, and the property be still in the hands of those among whom it was divided when his death was declared, it will be given back to him.

But if it has passed away from their hands, he would have no right to recover it

When a person dies leaving certain heirs, one of whom is missing, the division would be made after excluding the share of the missing person. For example, if a man dies leaving two daughters, a son who is missing and the son of a predeceased son, the daughters would get $\frac{1}{4}$th each, and a moiety will be kept in trust for the missing person. If he is not found and the Kâzi pronounces him to be dead, another $\frac{1}{6}$th will be given to the daughters, and the remainder to the grandson.

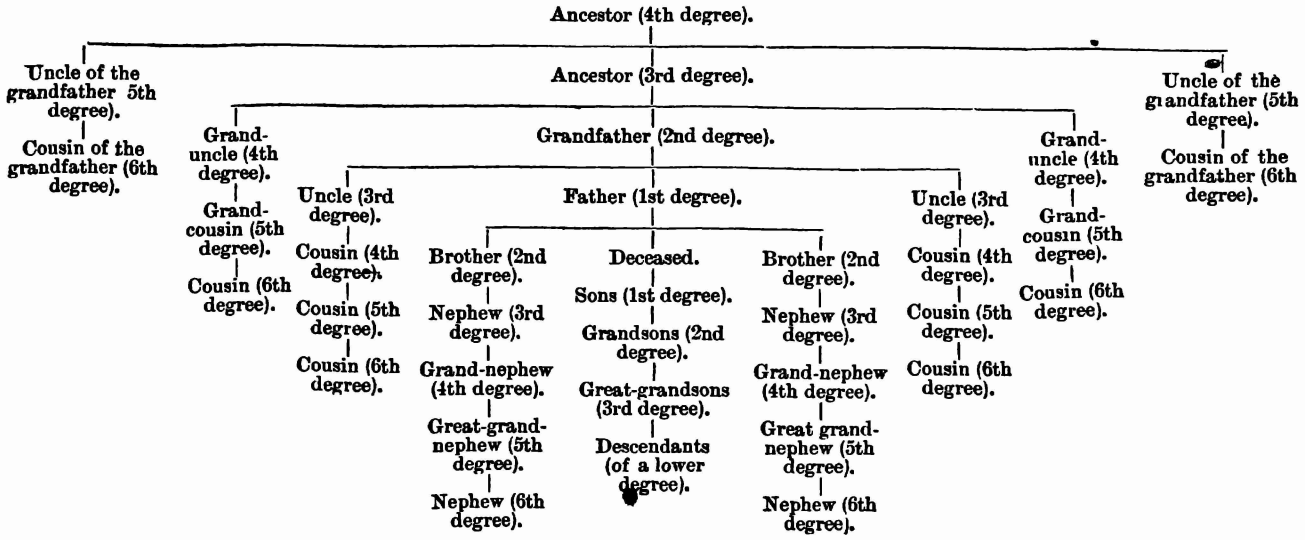
CHAPTER II.

MALIKI AND SHAFEI RULES OF SUCCESSION.

The Mâlikîs and Shâfeis are in general accord with the Hanafîs on the broad principles upon which the Sunni system of classification is based. For example, they also divide the heirs into the three classes, *viz.*, sharers, residuaries, and uterine relations, recognised by the Hanafîs.

With reference to the *sharers* there is no difference. As regards the *Asabâh*, there are some points of divergence between the Hanafîs on the one side and the Shâfeïs and Mâlikîs on the other. Originally these allowed the right of succession to the *Asabâh-bè-nafsehî* (residuaries) *proprio jure* in the collateral branch up to the 6th degree only as shown in table on page 93 :—

TABLE of ASABAH *proprio jure*, according to the MALIKI and SHAFEI SCHOOLS.



Right of cognates recognised.

But later lawyers have recognised the right of the *Asabâh* of a lower degree. In default of the *Asabâh*, whether *Asabâh-bè-nafsehî*, *bè ghairahi* or *mè ghairahi*, in their own right, in another's right, or with another, or for *special cause*, as the manumittor or his residuary, the property of the deceased goes to the uterine relations.

The right of succession is founded on four causes :—(1) kinship ; (2) marriage ; (3) clientage (*walâ*) ; and (4) Islâm, because in default of other heirs the general body of Moslems represented by the *Bait-ul-Mâl*, become entitled to the estate of a deceased person.

Originally there were ten males legally entitled to succession : (1) son ; (2) the son's son, how low soever ; (3) the father ; (4) male ascendants of a higher degree ; (5) the brother ; (6) the sons of the brother (excepting the son of an uterine brother) ; (7) the half-brother on the father's side ; (8) his son ; (9) the husband ; (10) the emancipator. The female heirs were seven : (1) the daughter ; (2) the son's daughter, how low soever ; (3) the mother ; (4) the grandmother and the other female ascendants called *true* ; (5) the sister ; (6) widow ; (7) the emancipatress.

The succession of cognates.

"According to the primitive Shâfeï doctrines," says the *Minhâj-ut-Tâlibîn*, "the succession of cognates was not recognized, and even the *Zav-il-Furûz* could not take more than the share appointed for them in the Koran, the rest going to the *Bait-ul-Mâl*. But it has been held by modern jurists that in the absence of all other natural relations the residue of the estate after allotment of the shares laid down in the Koran, should be divided among the sharers in proportion to their appointed shares. And the cognates are entitled to succeed to the exclusion of the *Bait-ul-Mâl*."

As regards the sharers and the classification of the *Zav-il-Furûz*, there is no difference between the Shâfeïs, Mâlikîs and Hanafîs.

When the sharers exhaust the inheritance, the *Asabâh* take nothing. It is only when any residue is left after allotment of the shares, that the *Asabâh* take the residue.

The father takes the share allotted to him in the Koran when he co-exists with the son or son's son how low soever. In default of a son or son's son how low soever he takes as a residuary when he exists with a daughter or son's daughter : (1) he takes his $\frac{1}{6}$; (2) the residue, after deducting the share of the daughter or son's daughter.

The mother can never claim more than $\frac{1}{3}$ or $\frac{1}{6}$; whilst her portion

is only $\frac{1}{3}$ of what *remains* after allotment of the husband or widow's share, if the mother happens to co-exist with the father and husband or wife of the deceased.

The paternal grandfather's right is governed by the same rules as the father's, subject to the following exceptions :—

(1) The brothers and sisters are always excluded by the father, unless they become entitled with him as residuaries.

(2) The father excludes his own mother, whereas the grandfather does not exclude the paternal grandmother.

(3) The father reduces the share of the mother when with a husband or widow to one-third of the residue after allotment of the husband or widow's share, but the grandfather does not do so.

When there is only one son he takes the entire inheritance ; when several, they take it equally among themselves.

A daughter with a son takes half the share of her brother, but when by herself, a moiety ; when there are two or more daughters, and no son, they take two-thirds among them equally.

The children of sons, in the absence of other heirs, are governed by the rules applicable to the children of the deceased.

When there is a son co-existing with the children of a predeceased son the latter are excluded.

If the deceased has left only brothers and sisters they share the inheritance in the proportion of two to one as in the case of sons and daughters.

The consanguine brothers and sisters are subject to the same rules as full brothers and sisters. There is one exception to this case, *viz.*, when a woman dies leaving as her heirs her husband, her mother, two uterine brothers or sisters, and a full brother. In this case the full brother would share with the two uterine brothers or sisters in the third allotted to them in the Koran ; but, if instead of a full brother, there had been a consanguine brother, he would have inherited nothing. This is called a case of *musharraka.*

When there are full brothers or sisters co-existing with consanguine brothers or sisters, the latter would be excluded unless the full sister or consanguine sister becomes an heir by title of agnation in consequence of being with a brother.

An uterine brother or sister takes one-sixth ; when there are several they take one-third among them equally without any distinction of sex.

The full sisters or consanguine sisters become "residuaries by right of another" when they co-exist with the daughters of the deceased or his son's daughters. They can claim a portion as if they were brothers, excepting that the consanguine sister is excluded by the full sister when there is a daughter of the deceased co-existing with them.

The sons of full brothers and consanguine brothers follow in general the rule established on the subject of the succession of their fathers. They differ from them in the following particulars:—

(1) They do not reduce the mother's share to a sixth.

(2) They are excluded by the paternal grandfather.

(3) They do not render their sisters residuaries.

(4) They are excluded from succession in the case called *musharraka*, of which we have already spoken.

The full brother or consanguine brother of the father is subject to the same rule as the full brother or consanguine brother of the deceased.

In default of residuaries by blood, the emancipator (if the deceased was a freedman) becomes entitled in preference to the uterine relations of the deceased. There is no distinction on the ground of the sex of the emancipator. In the absence of the emancipator his or her residuaries in their own right (*Asabâh proprio jure*) become entitled.

Non-Moslem. There is no succession between a Mussulman and a person who denies the unity of God and the messengership of the Prophet. The apostate does not inherit from anyone nor does anybody from him. The slave cannot inherit, but according to a later doctrine of Shâfeï, the slave who was partially enfranchised can have heirs of his own, though he cannot inherit himself.

Homicide. A person killing another has no right of succession to the latter's inheritance, though some make an exception to this rule in the case of a slayer who is not liable to a penalty.

When two persons entitled to succeed to one another in case of one predeceasing the other, die in a common calamity, such as drowning, &c., or when the time of their respective deaths cannot be ascertained, in other words, it cannot be known which of them died first, there is no succession between them, and their inheritance devolves on their respective heirs.

The *Mafkûd*. The goods of a prisoner of war or of a person who is missing, and of whom no news can be obtained, should be kept in the custody

of a trustee until his death has been established, or until a period sufficient to give rise to the presumption of his death has elapsed. In such a case the Judge must hold an enquiry, and then pronounce a declaration about the death of the missing individual, after which he will proceed to divide the succession among those who have the right of inheritance at the time of declaration. If a missing person is an heir to another, his portion would be sequestrated, *i.e.*, kept in trust whilst the other heirs would receive their legal shares.

If at the time when the succession opens, a woman is pregnant with a child who would be entitled to a share in the inheritance, the share of the infant would be reserved until his birth.

Aul recognised.

The doctrine of *aul* or increase in the denominator when the fractions amount to more than the integer is recognised as among the Hanafis. And the rules relating to partition are the same.

CHAPTER IV.

SHIAH LAW OF SUCCESSION.

SECTION I.

WE have thus far seen the mode of classification and the principles of distribution in force among the Sunnis, and it must have become apparent that the rules of inheritance among them are highly complicated. Among the Shiahs, on the contrary, the law of inheritance is of the greatest simplicity and does not involve any discussion regarding the relative rights of *agnates* and *cognates*—the *Asabâh* and the *Zav-il-Arhâm*. The great distinction, in fact, between the Shiah and the Sunni Law of Inheritance consists in the question of agnacy. The Shiahs repudiate *in toto* the doctrine of *taasîb* (تعصیب), consequently the paternal relations of the male sex, or what are called *Asabâh* proper in Sunni Jurisprudence, have no especial privilege, nor are they preferred to the relations connected with the deceased through females. The mode of classification adopted by the Sunnis is regarded by the Shiahs as an outrage on the natural feelings of the human heart.

For example, the Shiahs consider it as contrary to justice to exclude the daughter's children in favour of the remote descendants of a brother, on the factitious ground of their being connected with the deceased through male relations.

Shiah Law.

According to the Shiahs, there are two causes which give rise to the right of inheritance : (1) *Nasab* (consanguinity), and (2) *Sabab* (special cause). Consanguinity implies simply the tie of blood. All relations, therefore, connected with the deceased by the tie of blood, are entitled to share in his inheritance unless excluded by the operation of the rules which I shall presently define.

Nasab.

The relations who are entitled to succession by virtue of consanguinity (*nasab*) are divided into three classes or groups, and each class again is divided into two sections. The members belonging to the first class of heirs exclude from succession those belonging

to the second, whilst these, in their turn, exclude the members belonging to the third class. But the heirs of the two sections of each class succeed together. For example :—

(*a*) The first class of heirs entitled by *nasab* to inherit from the deceased consists (1) of the ascendants of the first degree, *viz.*, the parents, and (2) of the children and their offspring, including all lineal descendants of the deceased

(*b*) The second class consists (1) of the ascendants of all degrees, and (2) brothers and sisters and their descendants.

(*c*) The third class consists (1) of the paternal uncles and aunts, and their children, and (2) of the maternal uncles and aunts and their children.

Whilst there is a single member of the first class existing, those who belong to the second and the third class are excluded absolutely from the succession. In the same way, if there be any relation of the second class, co-existing with relations of the third class, the latter take nothing. But the members of the two sections of each class succeed together. For example, parents take a share in the inheritance of the deceased with the children of the deceased ; grandparents with the brothers and sisters ; maternal uncles and aunts with the paternal uncles and aunts. A child or child's child entirely excludes the brothers and sisters and their descendants. And so brothers and sisters and their descendants exclude the uncles and aunts, but they inherit together with the ascendants of higher degree.

If a Sunni Mussulman die leaving behind him a daughter's daughter with a brother's son, the brother's son would, as an *Asabâh*, take the entire inheritance in exclusion of the deceased's own grandchild. Among the Shiahs, the grand-daughter of the deceased, as a lineal descendant, takes the whole property to the exclusion of the brother's son.

If a Sunni Mussulman die leaving behind him a daughter and a brother, the daughter takes her specified share, *viz.*, a moiety, and the rest goes to the brother, as a residuary or *Asabâh*. Under the Shiah Law, she takes the whole—half as her specified share, and the other half by the doctrine of *return*.

The right of succession for special cause (*sabab*) or " affinity," is *Sahab.* divided under two heads :—

(1) The right of inheritance by virtue of matrimony (*zowjiyèt*) ; and

(2) The right of inheritance by virtue of *Walî* or special relationship.

(1) The right of inheritance by virtue of *zowjiyèt* appertains to the individual heir under all circumstances. The husband or the wife, accordingly, is never excluded from succession. If the deceased leave behind him a child and a widow, the latter takes her specified share, and the residue goes to the child. In the same way, a wife co-existing with the parents or grandparents or brothers and sisters of the deceased, is entitled to her specific share before the property is divided among the heirs, who succeed by virtue of *nasab*.

(2) The right of inheritance by *Walâ* (*al-mîras bi'l walâ*) has assumed a peculiar aspect among the Shiahs, owing to the political subjection in which they were kept in early times. This right is divided under three heads, *viz.* :—

(1) *Walâ-ul-itq* (ولاء العتق), "The right of inheritance possessed by the emancipator."

(2) *Walâ-'z-zâmîn-uj-jarîrah* (ولاء ضامن الجريرة), "The right of inheritance for obligation of delicts committed by the deceased."

(3) *Walâ-'l-Imâm* (ولاء الامام), "The right of inheritance possessed by the *Imâm* by virtue of the *Walâ* of *Imâmat* or spiritual headship."

Id. The first form of *Walâ* (*Walâ-ul-itq*) has its exact counterpart in the Hanafî Law, but the right which springs from it is regarded in different ways by the two schools. For example, under the Hanafî Law, if a slave were to buy his liberty, it would not affect the right of inheritance possessed by the emancipator; and if the slave dies after enfranchisement, leaving no *Asabâh* proper of his own, the emancipator would take the whole inheritance to the exclusion of the emancipated slave's "uterine relations." Under the Shiah Law, the emancipator succeeds to the inheritance of the freedman only under certain well-defined conditions, *viz.* (1) when the enfranchisement is purely spontaneous and voluntary on his part. When the slave's enfranchisement is obtained by payment of a ransom, or when he is manumitted in performance of a vow, or as a propitiative offering to the Almighty, or when the emancipation is the result of law, then the emancipator has no right of succession. (2) The emancipator is entitled to succeed only when the freedman has left no blood relations behind him; and (3) when, after enfranchisement, the master continues responsible for the delicts of the

Difference between the Shiah and Hanafî Law.

emancipated. If the emancipator's responsibility cease by operation of the law or by virtue of a special contract, at the time of manumission, he would have no right of inheritance to the estate of the emancipated slave, nor would he have any right if the deceased left any heirs connected to him by *nasab*.

Walâ-'z-zâmin-uj-jarîrah.

The *Walâ-'z-zâmin-uj-jarîrah* is in some respects analogous to the *Walâ-ul-mawâlât* of the Hanafîs, for the Shâfeïs recognise no similar right. The history of the origin of the *Walâ-'z-zâmin-uj-jarîrah*, or, at least, the form it has taken among the Shiahs, throws considerable light on the state of manners and the conditions of society among the Mussulmans in early times.

In certain stages of society it has been usual for a stranger on arriving in a foreign city to furnish guarantees for good behaviour. This custom appears to have existed in most of the Free Towns of Europe during the Middle Ages; and there can be little doubt that its counterpart in the East gave rise to the doctrine of "the right of inheritance based on suretyship." The custom acquired a distinctive character under the Abbasside sovereigns, who invariably exacted security for good behaviour from all strangers who arrived in the city of Bagdad from Khorasan. Those who became sureties were responsible to the State for any offence committed by their clients, and were in return entitled to succeed to the inheritance of the latter when they died leaving no heir.[1] But this right was neither reciprocal nor transmissible.

Walâ-ul-Imâm.

In the absence of the emancipator as well as the *Zâmin* ("the surety,") the Imâm, as the Spiritual Head of the Shiahs, becomes entitled to the inheritance, there being no escheat to the public treasury (*Bait-ul-Mâl*) under the Shiah law. The right of the Imâm, however, is not in the nature of an escheat to the sovereign. The property goes to him as the Spiritual Head of the Shiah Commonwealth, to be distributed among the poor and indigent of the locality where the intestate lived, or where he was born. In the absence (*ghîbat*) of the Imâm, as is practically the case at the present moment, the twelfth Imâm having mysteriously disappeared

[1] During the reign of Al-Mâmûn, the Imâm Âli ibn Musâ ar-Rezâ used to stand *zâmin* (surety) for all his people. He is therefore styled the Imâm Zâmin. The custom of tying a piece of gold on the arms of all persons leaving home making long journeys and commending them to the Imâm *Zâmin*, dates from this epoch.

near Kûfa, the property goes to his representative (the *Mujtahid*), the chief expounder of the law, to be distributed by him equitably and properly among the poor and indigent of the place where the intestate lived, or for such charitable and religious purposes as may seem consonant to his last wishes.

The right of the Imâm is, accordingly, not *quâ* sovereign, but *quâ* spiritual leader, and therefore it is subject to the ordinary bar of the Statute of Limitation. In India, the inheritance of a Shiah Mahommedan dying without leaving any possible heir of the various classes indicated above, goes to the *Mujtahid* of the locality nearest to the place where the intestate lived, as the representative of the Imâm; but supposing the right was neither claimed nor advanced for the space of twelve years from the date of the intestate's death, it would be barred by the ordinary limitation applicable to the claims of private individuals.

On this point, a *Fatwa* contained in the *Jâmaa-ush-Shittât*, pronounced by a recent leading *Mujtahid* of Irân (Persia) is worth insertion.

Q. "What should be done with the property of a person dying without leaving any heir behind him (*mâl-i-min-lâ-wâris-lahû*) during the absence (*ghîbat*) of the Imâm; whether it is to be distributed among the poor of the locality where the deceased was born, or where he died, or where the property is situated; whether it is to be given generally to the poor, or applied to specific purposes; or whether it is to be preserved until the appearance of the Imâm; and in case it is required to be given to the poor, might it be given to one single individual whilst others are available, or must it be distributed among many; is the property to be given to the poor intact, or might it be sold and its proceeds distributed?"

A. "The property of an intestate leaving no heir behind him does not go to the *Bait-ul-Mâl.*"

"It is the property of the Imâm, whether he is present or absent (*ghâib*). If the deceased leave any heir behind him, even *zâmin-i-jarîrah*, the Imâm does not succeed. If the Imâm be absent, the property should be distributed among the poor of the deceased's village or native city (*bâlad-i-myèt*). If it be considered advisable by the *Mujtahid* to sell it, it is valid to do so, especially when the property in itself is of no use to the poor; when the poor are many, it is wrong to give it to one only, though there is

nothing in law to make it invalid. The distribution in those cases ought to take place under the direction of the *Hâkim* (Judge), who is the delegate of the Imâm, and such is the opinion of the *Kifâyah*."

From the use of the word *Hâkim* towards the end of the answer, it is clear that the *Mujtahid* acts in the capacity of a Judge in the administration of the estate of the deceased intestate. In Shiah countries not subject to foreign control, the *Mujtahid* who is the chief expounder of the law, is also frequently vested with the powers of the Kâzi. When this is the case, no difficulty occurs in the application of the principle of the Shiah Law. But in India, where the Shiahs are subject to a non-Moslem power, the question may arise under whose direction the distribution contempleted by the Shiah Law should take place. This question, it seems to us, is answered by the dictum quoted from the *Jâmaa-ush-Shittât*. The Civil Court, representing the *Hâkim* mentioned in the *Fatwa* would assume the charge of the property, and make it over to the *Mujtahid* (if there be any) to be distributed among the poor and indigent of the deceased's village or native city, under the Court's own control and supervision, so as to leave no room for doubt as to its proper application. If there be no *Mujtahid*, some Shiah officer should be appointed for the purpose of effecting the distribution. It must also be remembered that the law does not *necessarily* contemplate the application of the proceeds in the shape of alms. If the object of the law, which has in view the benefit of the poor and the indigent, "who are always in need of help," can be attained by establishing an institution by which *regular* assistance can be rendered to them, it would be valid.

Consanguineous relations.

Under the Shiah Law, heirs to whichever class they may belong among the consanguineous relations, are divided into three categories in respect of the *right* which entitles them to participate in the inheritance of the deceased, *viz* (1) those whose heritable right is acquired by virtue of the shares assigned to them in the Koran (*al-farz*),[1] and who are therefore designated *zû-farz*; (2) those who inherit sometimes as *zû-farz* and sometimes by virtue of their

[1] For example, among those entitled by virtue of *nasab* (consanguinity), the mother is one who takes her appointed share and also the residue when there are no other heirs; the husband or wife belong to the same category, and take, except in rare cases, their shares as fixed in the Koran.

relationship (*karâbat*) to the deceased;[1] and (3) those who take only by virtue of their relationship, and are, therefore, called the *zû-karâbat*, and are entitled to the *sahâm-bil-karâbat*.

The *zû-farz*. The heirs who are entitled to appointed shares (the *zû-farz*) are:—

(1) A daughter or daughters, when without (the deceased's) father, and her own brother or brothers.

(2) Full sister or sisters, or a consanguine sister or sisters existing without a grandfather and brother or brothers of the same degree as themselves.

(3) The father, with a child or children of the deceased.

(4) The mother.

(5) The husband, or the

(6) Wife.

(7) The person or persons related by the same mother only.

When there is only one heir, whether a *zû-farz* or a *zû-karâbat*, or one entitled by virtue of the special relationship of *sabab*, such heir takes the entire inheritance.

When the heir is a *zû-farz*, he or she takes first the appointed share, and the remainder is *returned* to such heir.

When the heir is a *zû-karâbat*, the entire inheritance goes to him by virtue of the relationship by blood; and so also when the relationship is one created by *sabab*.

For example, an only daughter takes her appointed share, *viz.*, one-half, and the remainder goes to her by *return*.

An only son takes the entire inheritance by right of *karâbat*, there being no specific share assigned to him by the law.

When the deceased is a female and leaves behind her no relation excepting a husband, who is entitled to succeed by virtue of the *sabab-i-zowjiyèt* (matrimony), he takes the entire inheritance, first his specific share, and the remainder by *return* (*radd*).

When there are two or more heirs who inherit, not as *sharers*, but by *karâbat* or *sabab*, they take the estate in proportion to their respective rights. For example, when there are two sons, they divide the estate equally; when there are only a son and a daughter, the son takes two-thirds and the daughter one-third.

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[1] For example, the father, the daughter or daughters, a full sister or sisters, and the uterine brothers and sisters.

When there are several heirs, some connected with the deceased through the father and others through the mother, then each party takes the portion of the person through whom they are related. For example, when there are paternal as well as maternal uncles and aunts, then those connected on the father's side take two-thirds, and one-third goes to those who are connected on the mother's side. When the individuals so related to the deceased are themselves of different descriptions, then the share allotted to the group is divided according to their sex or respective individual rights. For example, if the deceased leave behind him several paternal uncles and aunts, they take two-thirds among them as a body, but the two-thirds is divided among them in the proportion of two to one, so as to give the males double the share of the females.

The children of consanguineous heirs, if not in any way excluded, take the place of their deceased or *disqualified* parents, and receive proportionately the shares of their parents. For example, if a man die, leaving the children of a son and the children of a daughter, the first take two-thirds of the estate and divide it proportionately amongst them, according to their respective rights, whilst the children of the daughter take one-third (to which their mother was entitled) and divide it in the same way.

When there are two or more heirs, one or more of whom are entitled as *zû-farz* and the others as *zû-karâbat*, the *zû-farz* take their respective shares before the residue is divided among the latter.

Full and half-blood relations.

When there are several relations some of the full and some of the half-blood, those connected on the mother's side *only* take one-third which is divided among them equally *without distinction of sex*, (if only one, he or she takes one-sixth,) and the residue is divided among the relations of the full blood in the usual proportions ; relations on the father's side being entirely excluded. For example, if the deceased leave some full brothers and sisters, and some half-brothers and sisters, both on the father's and the mother's side, the *uterine* brothers and sisters take one-third of the inheritance among them and divide it *equally* without distinction of sex. If there be only one such uterine brother or sister, he or she takes one-sixth. The residue is then divided among the full brothers and sisters in the proportion of two to one, the brothers of the half-blood on the father's side being entirely excluded. It is only in default of the relations of the full blood, that those connected on

the father's side participate in the inheritance. For example, if a person die leaving a brother of the half-blood on the father's side, and a sister by the same father and mother, the latter would exclude the brother *in toto*. This rule applies to all cases.

The husband or widow is never excluded from succession.

When there are male and female heirs of the same degree in the order of relationship, belonging to the same class, and connected equally by the tie of blood, the male takes double the share of a female. For example, a son takes double the share of a daughter; a grandson double the share of a grand-daughter, and so on. In the case, however, of heirs related on the mother's side alone, an exception is made to the above rule. For example, uterine brothers and sisters divide the share allotted to them, *viz.*, one-third, *equally*, without distinction of sex.

When there are relations who are connected with the deceased on the father's side only, and others who are connected on the mother's side only, and both sets of relations are equal in degree and class, the two sets take their respective shares and divide the residue among themselves *pro rata*. For example, if the deceased leave behind him a sister of the half-blood on the father's side and a sister of the half-blood on the mother's side, both of them take their respective shares, *viz.*, one-half and one-sixth; and the remainder, *viz.*, one-third, is divided among them in the ratio of three to one.

The Shares.

As far as the shares are concerned, they are six in number, *viz.*, a moiety, a fourth, an eighth, a third, two-thirds, and one-sixth.

(1) A moiety is taken by—
  (*a*) The husband, when there are no children;
  (*b*) The full sister, in default of other heirs;
  (*c*) The daughter, when only one.

(2) The fourth is taken by—
  (*a*) The husband with children;
  (*b*) The wife, when there are no children.

(3) The eighth is taken by the widow[1] with children or children's children, how low soever.

(4) The third is taken by—
  (*a*) The uterine brothers and sisters, when two or more in number;

[1] Or widows.

(*b*) The mother, when the deceased has left no children, or *two or more* brothers or one brother and two sisters.[1]

(5) Two-thirds are taken by—

(*a*) Two or more daughters, when there are no son or sons;

(*b*) Two or more full sisters, when there is no full brother or when there are no brothers of the half-blood on the father's side only.

(6) A sixth is taken by—

(*a*) The father and the mother, when the deceased has left lineal descendants;

(*b*) The mother, when there exist with her two or more brothers of the full blood, or one brother and several sisters of the full blood (or by the same father only, the father himself being in existence);

(*c*) The single child by the same mother only, whether such child be male or female; *viz.* a uterine sister or brother.

The Succession of Relations by Consanguinity.
(Mirâs-ul-ansâb).

The classes of heirs.

1. The heirs entitled by virtue of *nasab* are, as already mentioned, divided into three classes (*tabkâs*).

2. The relations of the first class consist of the immediate descendants of the deceased and the lineal descendants.

3. When the father exists by himself, he takes the entire inheritance.

(Same under the Sunni Law.)

4. When the mother exists by herself, she takes the whole inheritance: one-third as her appointed share, and the remainder by right of *return*.

(Same under the Sunni Law.)

5. When the father and the mother exist together, the mother takes one-third, and the father takes the remainder.

(Same under the Sunni Law.)

6. When the deceased leaves behind him a father, a mother, and two brothers,[2] the mother takes one-sixth, and the father takes the remainder, to the total exclusion of the brothers.

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[1] If there are children or two or more brothers or one brother and several sisters, the mother's share is reduced to ⅓, though in the latter case the brothers and sisters take nothing.

[2] Or one brother and two sisters, or four sisters.

(Same under the Sunni Law.)

7. If the father and mother exist with children, the father and mother take one-sixth each.

(Same under the Sunni Law.)

8. When there is only one son, he takes the entire inheritance. If there are several sons, they divide the inheritance equally among themselves.

(Same under the Sunni Law.)

The Shiah Law recognises partly the principle of primogeniture holding that the eldest son is entitled to the sabre, the Koran, the signet, the robes of honour and other vestments of his deceased father.

9. When there is only one daughter, she takes the inheritance, half as her appointed share and the remainder by right of *return*. If there are two or more, they take the entire inheritance equally, two-thirds as their appointed share and one-third by right of *return*.

(Under the Sunni Law, they take the *entire* inheritance only when there are no other relations.)

10. When the two ascendants, or either of them, are co-existing with the descendants, then each of the ascendants receives one-sixth, and the remainder is distributed among the descendants *equally* if they be all males; but if there be a female or females among them, then each male has the portion of two females.

(Same under the Sunni Law.)

11. When a husband or wife of the deceased, co-exists with the parents and the children, then the husband or the wife takes his or her *reduced* share,[1] and the parents theirs, while the remainder goes to the children.

(Same under the Sunni Law.)

12. When there are the two ascendants and a daughter, the ascendants receive their one-sixth respectively and the daughter her moiety, and the residue is divided among them *pro rata*, that is, the parents take two-thirtieths and the daughter three-thirtieths.

(Under the Sunni Law the father takes the entire residue.)

13. When the two parents co-exist with one daughter and with brothers consanguine or of the full blood of the deceased, the

[1] *Viz.*, ¼ or ⅛.

parents take their respective shares, *viz.*, one-sixth, the daughter her moiety, and the remainder is divided *pro rata* between the father and the daughter, *viz.*, in the proportion of one to three.

(Under the Sunni Law, the father takes the entire residue.)

14. When the two ascendants co-exist with a daughter and the husband, the latter and the ascendants take their respective *reduced* shares, and the residue goes to the daughter. For example, the husband takes one-fourth, the parents one-sixth each, and the remaining five-twelfths goes to the daughter.

But in the case of the deceased being a male and leaving a wife behind co-existing with the daughter and the parents, they all take their respective shares, *viz.* one-eighth, one-half and two-sixths, and the remainder is divided among the parents and the daughter *pro rata.*

(Under the Sunni Law, in the first case there would be a proportionate abatement in the shares of all the heirs, and the deficiency would not fall entirely upon the daughter. In the latter case, the father would take the entire residue.)

15. If in the preceding case there were brothers[1] co-existing with the relations mentioned above, then the residue would be divided only among the father and daughters.

16. When there two or more daughters and one parent, then the latter gets his or her one-sixth, and the daughters get their two-thirds as their appointed shares, and the remainder reverts to them *pro rata* in the proportion of four to one.

17. If the deceased leave surviving her her husband and the two ascendants (parents), the husband takes his half, the mother one-third of the original estate, and the father the remainder.

(Under the Sunni Law, the mother takes one-third of the remainder after the allotment of the husband's share.[2])

Likewise, if the deceased leave a widow behind. Representation takes place in the descending line, or, in other words, on failure of the direct descendants (the immediate children), the children of the children take the places of their respective parents in the distribution of the inheritance, with the ascendants or parents of the deceased.

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[1] Or one brother and two sisters, or four sisters.

[2] See *ante.*

18. The lineal descendants exclude from succession everyone connected with the deceased through them, and also everyone connected through the deceased's parents, but not the parents themselves. For example, they (the children) exclude the deceased's brothers and their children, his grandparents and their ancestors, his paternal and maternal uncles and aunts and their children.

(Under the Sunni Law, the lineal *male* descendants alone represent their parents in the succession.)

19. Descendants nearer in degree exclude the more remote. For example, when the deceased has left a daughter and a predeceased son's son or daughter, the deceased's daughter takes the entire inheritance to the exclusion of his grandchild, on the principle of the nearer excluding the more remote.

(As already pointed out the Sunni Law is very complicated on this point, and differs materially from the Shiah rule. Under the Sunni Law, if the deceased leave behind him a daughter and a predeceased son's son, then the daughter takes her moiety, and the residue goes to the grandson. But if, instead of a son's son, there were only son's daughters, then these would take one-sixth equally among themselves. If, however, there were *two* or *more* daughters, the son's daughters would take nothing. But if there happened to be with the son's daughters a son's son also, then the daughters would take their two-thirds, and the remaining one-third would be divided among the grandchildren in the proportion of two for each male and one for each female. A son, however, would exclude *in toto* the sons and daughters of a predeceased son.)

20. Each descendant inherits the portion of the person whose place he or she takes in the succession. For example, if the deceased were to leave behind him the child, male or female, of a daughter, that child inherits the portion of its mother, whether alone or co-existing with the parents of the deceased; and the remainder, after the allotment of the share or shares, reverts to the child in the same manner as it would have reverted to his or her mother if she had been in existence. A son's child, male or female, inherits that which is inheritable by its father—the whole, if he be alone, or the residue if he exist with the deceased's parents, husband, or wife.

(Under the Sunni Law, a daughter's daughter, as an *uterine relation*, has no place in the inheritance until all heirs with a resi-

duary title are exhausted. For example, a father would exclude entirely, under the Sunni Law, a daughter's daughter. But under the Shiah Law, the father would take his one-sixth, and the daughter's daughter one-half (her mother's share), and the residue would be divided among them in the proportion of three to one.[1])

21. When the children of a son co-exist with the children of a daughter, the son's children take two-thirds of the inheritance (in their father's right), and the daughter's children one-third (in their mother's right).

(Under the Sunni Law, the children of a daughter are uterine relations, and are postponed until the sharers and the residuaries are exhausted.)

22. When there is also a husband or wife co-existing with the grandchildren, then the husband or wife receives his or her *reduced* share, *viz.*, one-fourth or one-eighth, and the remainder is divided among the grandchildren, the son's children taking two-thirds of the residue, and the daughter's children one-third.

The daughter's children divide their share of the inheritance in the proportion of two for each male and one for each female.

23. The grandfather or the grandmother takes no share in the inheritance whilst there is a child or an ascendant of the first degree co-existing.

The Succession of Heirs of the Second Class.

Consanguineous heirs of the second class.

24. The second class of consanguineous heirs comprises the ascendants of a higher degree than the parents, *viz.* (*a*) grandparents and their ancestors, and (*b*) brothers and sisters and their lineal descendants.

25. If there be only one full brother, he takes the entire inheritance; when there are several, they divide the inheritance equally among themselves.

(Same under the Sunni Law.)

26. If there be sisters with the brothers, the brothers take two shares each and the sisters one each.

(Same under the Sunni Law.)

27. In default of full brothers and sisters, the succession passes to the consanguine brothers and sisters, and the mode of distribution is the same as in the case of full brothers and sisters.

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[1] See *ante*.

28. When there are full brothers and sisters co-existing with consanguine brothers or sisters, these latter take nothing.

29. When there is a uterine brother or a uterine sister alone surviving the deceased, he or she receives first the *sahâm-ul-farz*, viz., one-sixth, and the remainder by *return*.

30. If there are two or more uterine brothers or sisters co-existing with full brothers and sisters, the former receive one-third, which is divided equally among them without distinction of sex, whilst the full brothers and sisters take the remainder in accordance with the general principle.

(Same under the Sunni Law.)

31. When there are uterine brothers and sisters co-existing with one full sister, the former take one-third, and the latter (the full sister) one-half, and the remainder is *returned* to her.

32. When there is only one uterine brother or sister and one full sister, the former takes one-sixth, and the latter the residue, partly as her share and partly by *return*.

33. When there are uterine brothers or sisters and two or more full sisters, the former take one-third equally among them and the latter two-thirds.

34. When there are no full brothers and sisters, then consanguine brothers and sisters take their places.

(Same under the Sunni Law.)

35. The paternal or maternal grandfather, if alone, without any co-heir, takes the entire inheritance ; so does the grandmother.

(Same under the Sunni Law.)

36. When there are ancestors of the paternal as well as of the maternal line, the former receive two-thirds, to be divided among them in the proportion of two shares to each male and one share to each female ; whilst the latter, *i.e.*, the maternal ancestors, take one-third, to be divided equally among them without distinction of sex.

(Under the Sunni Law, the paternal ancestors [1] take the entire inheritance.)

37. The paternal grandfather and grandmother share in the succession according to the general principle of two shares for each male and one share for each female.

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[1] True grandfathers.

(Same under the Sunni Law.)

38. The maternal grandfather and grandmother share equally (without distinction of sex).

(Under the Sunni Law, the maternal grandmother takes the entire inheritance.)

39. When there are uterine brothers or sisters co-existing either with a maternal grandfather or grandmother, or with both, then one-third of the estate is divided *equally* among them all.

(Under the Sunni Law, when there is only one uterine brother, he receives one-sixth ; when two or more, one-third; the remainder goes to the maternal grandmother.)

40. When there are paternal and maternal ancestors in conjunction with full brothers and sisters, or the children of such brothers and sisters, or with brothers and sisters of the half-blood on the father's side, or their children, then the maternal ancestors take one-third, and the paternal ancestors take the remaining two-thirds with the brothers and sisters or their children (being treated in the distribution as brothers and sisters themselves), in the proportion of two shares for each male and one share for each female. For example, if the deceased left behind him the mother's mother and the mother's father, also the father's mother and the father's father, besides a brother and sister, in this case one-third would be taken *equally* by the deceased's mother's mother and the mother's father, whilst the remaining two-thirds would be divided among the brother and sister of the deceased and his paternal grandparents, in the proportion of two shares for each male and one for each female, that is, four-eighteenths would be the share of the brother and the grandfather respectively, two-eighteenths of the sister and the grandmother respectively.

41. The ancestors, however remote, inherit with brothers and sisters and their children. But when there are several ancestors the one nearest to the deceased excludes the more distant.

42. The husband or wife co-existing with brothers and sisters or their children or grandparents, always receives his or her full share.

43. When there is a full sister and a sister of the half-blood on the mother's side, the latter takes one-sixth, and the residue goes to the full sister, partly as her appointed share and partly by *return*.

44. When there is a sister of the half-blood on the father's side instead of a full sister, the residue, after allotment of the respective shares, is divided between the half-sister on the father's side and the half-sister on the mother's side, in the proportion of their shares. For example, when there is a half-sister on the mother's side, and a half-sister on the father's side, the former takes one-sixth and the latter one-half, and the remainder is divided among them in the proportion of one to three.

45. When there is a half-brother by the same mother only and the son of a full brother, the whole of the inheritance goes to the former.

(Under the Sunni Law, the half-brother gets one-sixth, and the remainder goes to the son of the full brother.)

46. The children of brothers and sisters represent their predeceased parents, and each one of them inherits the portion of the person through whom he or she is connected with the deceased, or, in other words, the part which is assigned to its direct ascendant.

(The children of sisters are uterine relations under the Sunni Law, and do not succeed until the agnates are exhausted.)

47. When there is only one child of a brother or a sister, it takes the entire portion assigned to its ascendant.

48. When there are several children of the brother or the sister, the portion assigned to their predeceased ascendant is divided equally among them, if they be all of the same sex; when they are not all of the same sex, then the males receive double the share of the females.

49. In case there are several children of the uterine brothers or sisters, the portion which they take in right of their parents is divided equally among them.

50. The surviving children of a full sister who is predeceased, receive the moiety of the inheritance in right of their mother, "besides what may revert by *return*."

51. The children of a brother take the remainder like their father, after allotment of the fixed shares. The children of two or more predeceased sisters take two-thirds, unless there is a husband or wife, when they take what remains after allotment of the husband's or wife's share.

52. In default of children of full brothers or sisters, the children of half-brothers and sisters on the father's side take their place.

53. The child of an uterine brother or sister takes one-sixth; while if there be several children, they receive one-third.

54. When there are several children of uterine brothers and sisters, as well as of full brothers and sisters and of half-brothers and sisters on the father's side, the latter are excluded entirely, one-third going to the first, and two-thirds to the children of full brothers.

55. If, in the above case, there were a husband or a wife co-existing with the relations mentioned, the husband or the wife would take his or her full share; the children of uterine brothers and sisters would take one-third of the *original* estate (or if only one child, one-sixth); and the remainder would go to the children of full brothers and sisters; in their default, to the children of consanguine brothers and sisters.

56. The lawyers are not agreed whether, when there are children of uterine brothers and those of a consanguine sister, the residue, after allotment of their respective shares, should be divided among them *pro rata*, or should go to the latter entirely.

The Succession of Relations of the Third Class.

Consanguineous relations of the third class.

57. This class comprises the paternal and maternal uncles and aunts of the deceased, however distant, and their children.

58. The paternal uncle, when alone, takes the entire inheritance. When there are several uncles, they divide the inheritance equally among them. The same rule applies to paternal aunt or aunts.

59. When there are paternal uncles and aunts, they take the inheritance in the usual proportion of two to one.

(Under the Sunni Law, the entire inheritance goes to the paternal uncles to the exclusion of the paternal aunts.)

60. When there are uncles and aunts, some of whom are the deceased's father's half-brothers and sisters on the mother's side and some are of the full blood, then the paternal uncles and aunts on the father's or mother's side take one-third among them equally, or if only one, such uncle or aunt takes only one-sixth, whilst those who are full brothers and sisters of the deceased's father take the remainder, in the proportion of two shares for each male and one share for each female. The consanguine brothers and sisters of the father are excluded by the full brothers and sisters.

(Under the Sunni Law, the uncles who have the same father and mother as the father of the deceased, or who have the same father,

that is, the full brothers and consanguine brothers of the deceased's father, exclude all other relations from the succession.)

61. The cousin or a paternal uncle's son, does not inherit with a paternal uncle, because in this line also the nearest always exclude the more remote, except in one case, *viz*, when there is a son of a full paternal uncle and a consanguine paternal uncle, the cousin excludes the uncle. This example applies only to a case where the cousin has preference over the uncle; if instead of a consanguine paternal uncle, there were a maternal uncle or a paternal uncle of the half-blood on the mother's side, the cousin would be excluded.

62. The maternal uncle takes the entire inheritance when by himself. So also, when there are two or more such uncles or aunts. When the maternal uncles and aunts of the same degree exist together, they share the inheritance equally without distinction of sex.

63. When there are uterine maternal uncles and aunts existing with maternal uncles and aunts of the full blood, the first receive one-third, which is divided among them equally without distinction of sex; and the maternal uncles and aunts of the full blood receive the remaining two-thirds, to be divided in the proportion of two for each male and one for each female. The consanguine uncles and aunts are excluded by the full uncles and aunts.

64. When there is an uncle or aunt of the maternal line and one uncle or aunt of the paternal line, the first takes one-third and the latter two-thirds. So also if there are several of them.

65. When there are paternal and maternal uncles and aunts of the father co-existing with the paternal and maternal uncles and aunts of the mother, those related through the mother alone, *i.e.* the uterine relations, receive a third, which is divided equally among them; whilst those related through the father alone, *i.e.*, the consanguine relations, receive two-thirds, one-third of which is divided *equally* among the father's maternal uncles and aunts, and the remaining one-third among his paternal uncles and aunts *unequally*, in the proportion of two shares for each male and one share for each female.

66. In default of the deceased's uncles and aunts of the paternal as well as maternal lines and their descendants, the succession passes to the paternal and maternal uncles and aunts of his father and mother and their children; such is the case with each generation, the nearer being preferred to the more remote.

67. With reference to those who have a double title in the inheritance of the deceased, the Shiah Law gives to such heir a share in virtue of each title, unless one title operates to the exclusion of the other, when the heir receives his or her share in virtue of the superior title. For example, supposing a woman dies leaving behind her a husband who is also her cousin (being the son of her paternal uncle), then this heir receives a share in the inheritance, in virtue of matrimony, as well as in virtue of the relationship of blood. But if the deceased left behind him a half-brother on the mother's side, who is the son of his paternal uncle, he succeeds as a uterine brother, for in law, a uterine brother excludes the cousin.

Rules relating to the Succession of Husbands and Wives.

(*Ahkâm-ul-Azwâj.*)

Husband and wife.

68. As stated before, a husband or wife is never excluded from the succession. The husband receives his fixed share under all circumstances, and so does the widow, and it is only after the allotment of *their* shares, that the partition of the estate can take place among the other heirs.

69. The husband and the wife succeed to each other mutually without any condition to that effect in the contract of marriage, when it is permanent in its nature. But as a section of the Shiahs recognise the validity of temporary contracts of marriage, it is necessary to mention that persons so married have no reciprocal right of inheritance, unless there is a condition to that effect expressly entered into at the time of marriage.[1]

70. A wife definitively divorced does not succeed to her former husband's inheritance;[2] nor does she succeed on his death if the marriage was contracted in illness and never consummated owing to such illness.[3] But if the woman died before her sick husband, then the right of inheritance would vest in the husband. So also, if the woman were ill at the time of marriage and died of that illness before consummation, the husband would be entitled to inherit.

71. If a woman be divorced by a husband during an illness of which he does not recover, and which eventually causes his death, her right to a share in his inheritance continues for the space of one year, so that if the husband died within the year she would succeed, but if he recovered during that interval and died either of the same

[1] *Jâmaa-ush-Shittât.* [2] See *seq.*

[3] Marriage contracted by a person who is ill is dependent upon consummation.

disease or any other complaint, she would not succeed. The husband, however, would have no right to inherit from his wife even if she died *within* the year.

(Under the Sunni Law, the right of inheritance continues until the expiration of the woman's period of probation.[1])

72. The husband and the wife have a mutual right of inheritance so long as the marriage subsists in fact or constructively in law.

73. Minors contracted in marriage to each other by their fathers or paternal grandfathers have a mutual right of inheritance. But if the contract were entered into by guardians other than the fathers or paternal grandfathers, then the marriage remains in suspense until assented to or ratified by the parties on attaining majority ;[2] and if one of them should die in the interval before the ratification of the contract, the survivor would have no right of inheritance.

(The Hanafîs differ on the latter point.)

74. If one of the minors alone attained his or her majority and ratified the contract, and the other died before attaining his or her majority, the former would have no right of inheritance. But if the ratifier died, then the part which would fall to the share of the survivor would be reserved for him or her until the attainment of majority, in order to enable the survivor (husband or wife) to exercise the right of option.

75. When there are no children, the husband takes one-half of the deceased wife's inheritance.

76. When there are children, the husband takes a fourth.

(Same under the Sunni Law.)

77. When there are several widows, they take the fourth or eighth equally among themselves.

78. The husband takes a share in all kinds of property left by his deceased wife, and so does the widow when she has a child "born of her womb," or child's child. But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including *household* effects, trees, buildings, &c.[3] She takes no interest in the landed property. When there are several widows, they take the fourth of the personal estate *equally*. But when the

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[1] See *seq.* [2] See *seq.*

[3] *Jâmaa-ush-Shittât.* See the case of *Mustt. Asloo*, 20 Sutherland's Weekly Reporter p. 297.

widow has children, she takes an eighth of both personal and real property. If the children, however, be not of her womb, she is *not* entitled to an eighth of the real estate.

(Under the Sunni Law, the widow, in default of children, takes a fourth of the entire inheritance, both real and personal. The great Shiah doctor, Shaikh Syed Murtezâ,[1] is of opinion that a childless widow is entitled to a fourth of the entire inheritance. In this view he is in accord with the Mutazala doctors.)

79. A section of the Shiahs recognise the validity of marriages contracted for a determinate period of time. According to them a woman married under a temporary contract is entitled to inherit only if there be an express condition to that effect. In that case, she succeeds like a wife married under a permanent contract. Temporary marriages.

80. If a woman die leaving her surviving her husband as her sole heir, he takes the entire inheritance, half as his specified share and the remainder by *return*. According to the ancient doctors, the widow, when sole heiress, did not take by *return*; according to them, she took her one-fourth, and the residue went to the Imâm.

According to the modern jurists the widow also is entitled to take by *return*. This is the rule now in force.

In early times the Sunnis likewise allowed the residue to go to the husband, but not to the widow. For example, if a woman died leaving her husband as her sole heir, he took the entire inheritance; but if a man died leaving behind his widow as his sole heiress, she took her one-fourth, and the rest escheated to the *Bait-ul-Mâl*. The modern jurists,[2] however, are of opinion that as the *Bait-ul-Mâl*, which in early times existed for the benefit of the indigent Moslems, and for the promotion of the welfare of the Islâmic Commonwealth, is now entirely shorn of that character, being simply the Government exchequer, the doctrine of escheat does not apply to either the case of a husband or a widow. They accordingly hold that where an intestate dies leaving no other heir, excepting a wife or a husband, the entire inheritance goes to him or her. This view has been rightly adopted and upheld by the Indian Law Courts.[3]

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[1] Abul Kâsim Ali ibn Abî Ahmed al-Hussainî *ibn-ul Huda*

[2] See the *Radd-ul-Muhtâr* in *loco*

[3] See the case of *Musst Subhani*, 1 S. D. A Reports and the more recent decision of the Calcutta High Court in the case of *Mohammed Arshad Chowdry* v. *Sajida Bano*, I L , 3 Cal Series, p 702.

81. As has been before pointed out, the Shiah Law does not recognise the doctrine of escheat to the *Bâit-ul-Mâl*. In the *Sharâya-ul-Islâm*, it is laid down that, "if the Imâm is absent or *ghâib*, the property should be distributed among the poor and the indigent, and should not be given up to any but a *pious* Sultan"[1] for distribution in the same way.

When the deceased leaves no heir, not even a *zâmin-uj-jârirah* (a surety), the whole of the property goes to the Imâm, whether he is present or absent, for the relief of the poor and indigent of the deceased's city or village. Ali, the fourth Caliph (the first Imâm of the Shiahs), used to distribute the property among the poor and indigent of the deceased's native town and among the weak and infirm neighbours of the deceased.[2] The Imâm being at the present moment absent or *ghâib*, the property would be taken charge of by the *Mujtahid* or the *Hâkim* to be distributed among the indigent and helpless neighbours of the deceased belonging to the Shiah sect. Preference should always, however, be given to the poor descendants of the Prophet.

As under the Sunni Law, funeral expenses must be first paid out of the assets of a deceased and then his debts. When a person has died involved in debt to the full amount of his property, it is not to be transferred to his heir, but will remain subject to the same conditions as if it still belonged to him. If the debts should not absorb the whole of his estate, so much of it as is required for the payment of his debts remains subject to the same conditions, while the surplus is to be transferred to his heirs.

Section II.

Causes of Absolute Exclusion from Inheritance (موانع الارث) Mewanah-ul-Irs.

The Shiahs recognise three causes of eviction from inheritance, *viz.*, denial of the unity of God and the messengership of the Prophet (*kufr*), intentional homicide or murder (*katl*), and slavery (*rikkiyèt*).

Kufr. 1. Those who deny the unity of God and the messengership of the Prophet have no title to the inheritance of a deceased Mussul-

[1] *Jâmaa-ush-Shittât.* [2] *Irshâd-ul-Allâmèh; Sharâya-ul-Islâm.*

man. So that, if a Shiah Mussulman die leaving behind him an heir who is a "denier" he is debarred from inheriting, even though he be nearest to the deceased. For example, if a man die leaving behind him a son who is a "denier," and a grandson who is a Moslem, the son would be excluded from the succession, and the grandson would take the inheritance to the absolute exclusion of his own father.

(Same under the Sunni Law.)

When a Moslem dies leaving heirs who deny the unity of God, the estate of the deceased would go to the Imâm unless the heirs believe in divine unity and the messengership of the Prophet as under the Sunni Law. Abjuration by a Moslem of the unity of God and the messengership of the Prophet causes a forfeiture of the right of inheritance. I have already described the change effected in the Mussulman Law by Act XXI of 1850, and those remarks apply, *mutatis mutandis*, to the Shiah Law. But though by virtue of this Act an "apostate" is not liable to exclusion, his children if "deniers" would have no right of succession to the inheritance of their Moslem relation, to whom they would have succeeded had they been believers in the unity of God.

If the "apostate" should die after the inheritance has opened and the right of succession has vested in him, in that case his children, though "deniers," would not be excluded.

When a Moslem apostatises by denying the unity of God and the messengership of the Prophet, his wife becomes immediately separated from him, and the marriage relationship becomes extinguished. And she has to observe the *iddat* as if he were dead. Apostasy.

With regard to an "apostate," however, who was not by birth or parentage a Moslem, the *iddat* of his wife commences from the date of his change of religion; and if he returns to the faith before the expiration of the *iddat*, he has still a preferable right to her; but if the *iddat* has once expired, his right is gone for ever, and he has no means of retaining her.

A Moslem heir is preferred to non-Moslem[1] heirs in the succession to a deceased non-Moslem relative. So that if a non-Moslem die leaving a Moslem and a non-Moslem heir, the Moslem heir though remote in degree, succeeds in preference to the non-Moslem

[1] The word "non-Moslem" is used in the sense of a "denier."

heir. Were the non-Moslem, however, to leave only non-Moslem heirs, the inheritance would go to them in preference to the Imâm. If, however, any one of them should adopt the Islâmic faith, the entire inheritance would descend to him to the exclusion of the non-Moslem heirs.

(Under the Sunni Law, a Moslem does not inherit from a non-Moslem, nor does a non-Moslem inherit from a Moslem.)[1]

When either of the parents is a Moslem, the law presumes the child to be a Moslem (until it is able to make a choice), and the right to its succession is regulated by the laws of Islâm. So also when one of the parents of a child, both being "deniers" at the time of its birth should accept the doctrine of Unity during its infancy, the presumption would be the same, *viz.*, that the child is a Moslem.

The Moslems inherit from each other though they may belong to different sects.

(Same under the Sunni Law.)

Apostates; succession to their estate.

As regards the succession to the estate of a *murtedd*, or an "apostate," the same rule applies, that is, though an "apostate" may not succeed to the inheritance of a Moslem relative, Moslem heirs may succeed to his inheritance.

Among the Shâfeïs, the inheritance of an "apostate" escheats to the *Bait-ul-Mâl*, whether he leaves any heir or not.

Among the Hanafîs, in the case of a male "apostate," a distinction is made regarding the time when the property was acquired. For example, if the property was acquired before apostasy, it goes to the Moslem heirs; but if it was gained subsequent to the apostasy, then it escheats to the *Bait-ul-Mâl*. In the same way, the portion which was acquired before apostasy goes to the Moslem heirs, and the portion acquired afterwards goes to the *Bait-ul-Mâl*. This is the view of Abû Hanîfa, and the principle laid down by him is followed in most Mahommedan countries. But Abû Yusuf and Mohammed differ from Abû Hanîfa on this point, and agree with the Shiahs in holding that the entire estate of an "apostate" descends to his Moslem heirs.[2] In the case of a female apostate, however,

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[1] *Fatâwa Alamgiri*, Vol. VI, p 631.

[2] Compare, Phear, J., in the matter of the application of Zaynab Bibi, September 1876, unreported.

her entire property, whether acquired before or after apostasy, goes to her Mussulman heirs.[1]

(Difference of country involving difference of allegiance is also a bar to succession under the Sunni Law ; but this is confined to non-Moslems only. Moslems, among themselves, though owning different allegiance, succeed to each other. The Mussulman sovereigns, however, by special treaty regulations, have granted to the subjects of non-Mahommedan powers the privilege of taking estates by inheritance in Mahommedan countries.)

The Shiahs do not regard difference of nationality to be a bar to succession in any case.

Section III.

Exclusion from Inheritance arising from Murder, &c.

Homicide.

2. Under the Shiah Law the homicide must be intentional and unjustifiable to be a bar to succession. An unintentional homicide, resulting from inadvertence or accident, does not exclude the person who has committed the act from the succession of the person killed. But the absence of intention must be clearly proved.

(Among the Hanafis, homicide, intentional or unintentional, invariably excludes from inheritance. An act, however, committed by an infant or an insane person which causes death, does not exclude such infant or such insane person from succeeding to the estate of the deceased. Or if a person kill another in justifiable war, or when inflicting punishment under the direction of law, such person is not excluded from the inheritance of the killed. According to the Shâfeïs, the person who causes the death of another, under any circumstance whatsoever is excluded *in toto* from the succession.)

If a person should slay his father, and the parricide has a child, this child may inherit from the grandfather, for the crime of a father is no bar to the succession of his children ; but if the heir of the murderer be a *Kâfir*, they are both excluded together, and the inheritance goes to the Imâm, unless the "denier" should embrace the faith, when he would be entitled to the inheritance.

Slavery.

3. Slavery is a bar to succession under the Shiah as well as the Sunni Law. Under the Shiah Law, if a person leave no other heir but a slave, his property is to be sold, and the proceeds applied to

[1] *Sirâjia*, p. 58 ; *Futâwa Alamgiri*, Vol. VI, p. 631.

the emancipation of the slave. The Sunnis do not recognise this principle, but hold that the inheritance escheats to the *Bait-ul-Mâl.*

If a person should die leaving one heir free and another a slave, the whole inheritance would go to the one who is free, though he be more remote, to the exclusion of the slave, though he be nearer to the deceased.

If the slave has a child who is free, it would inherit in preference to its parent.

When the deceased has left an heir who happens to be a slave, the slave is to be purchased out of the estate and then emancipated, whereupon he would become entitled to the residue, and his proprietor may be compelled to dispose of him. Should the property left by the deceased be inadequate to the purchase, some doctors have said that the slave must be ransomed to the extent of the property, and left to work out the remainder of his price by emancipatory labour.

If there are two or more heirs, one of whom is a slave at the ancestor's death, but is emancipated before partition, he is entitled to participate in the succession if equal in degree to the others, or to take the whole alone if he is nearer to the deceased,

Illegitimacy.

4. *Illegitimacy* is a bar to succession under the Shiah Law. But a distinction is drawn between a child of fornication (*walad-uz-zinâ*) and a child whose parentage has been formally disavowed by the father[1] ("a child of imprecation," *walad-ul-malâinah*). An illegitimate child is regarded as a *nullus filius*, as owning no *nasab* to either of its parents, and therefore incapable of inheriting from either. Nor, supposing the child died leaving its parents behind or relations connected through them, would they be entitled to its succession.[2] The *legitimate* offspring and the husband or wife, as the case may be, of an illegitimate person are entitled to inherit from such illegitimate person and from each other *reciprocally*. But where the *walad-uz-zinâ* leaves no *legitimate* issue or any one connected by the tie of matrimony, the inheritance goes to the Imâm. The law is otherwise as regards a "child of imprecation." Such child owns a *nasab* to its mother and the maternal relations, and consequently inherits from them, and they, on their side, have the right of inheriting from such child. The disavowing father and those

[1] See the Chapter on *Legitimacy.*

[2] *Jâmaa-ush-Shittât; Irshâd-ul-Allâmah; Sharâya.*

related through him do not inherit from such child, even though subsequently the father may acknowledge the parentage. But if the child is *acknowledged* after a formal disavowal, that is, the renunciation is withdrawn by the father, it would be entitled to succeed to its father's inheritance though not to the paternal relations.[1]

(Under the Sunni Law, a "child of fornication" is placed on the same footing as a "child of imprecation." The *walad-uz-zinâ* inherits, like the *walad-ul-malâ'inah*, from its mother and the mother's relations, and they likewise inherit from it.)[2]

It must be mentioned, however, that some Shiah doctors are in accord with the Sunnis in holding that a *walad-uz-zinâ* has a right of succeeding to its mother and the maternal relations. The other doctrine has been, however, adopted and enforced by the Indian Law Courts.[3]

Acknowledgment or *nasab*.

The first cause which gives rise to a right of inheritance is *nasab*. A man may establish to himself the *nasab* of a child whose paternity is not known, provided there is sufficient disparity of age for the one to be the father of the other.

But a man cannot affiliate to himself the child of a woman between whom and himself there has been such a distance as to preclude his having access to her for a period equal to the age of the child. If there is any dispute as to the paternity of the child the person acknowledging must establish the acknowledgment on proof.

When a child has been affiliated by acknowledgment, he cannot render it void by repudiating on attaining puberty, nor can the acknowledgor render it void by a subsequent disavowal.

No assent on the part of an infant is necessary to give him a right of inheritance to the acknowledgor, but if the person acknowledged be adult, in that case assent would be requisite. So that if the adult should deny the *nasab*, it would not be established.

The *nasab* of any relation other than a child cannot be established by acknowledgment, without the assent or concurrence of the person in whose favour it is made.

In order that an acknowledgment of any relationship other than that of paternity may give rise to a mutual right of succession, the

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[1] *Sharâya; Jâmaa-ush-Shittât.*

[2] *Fatâwa Alamgiri*, Vol. VI, p. 629.

[3] See the case on this point reported in 12 Sutherland's Weekly Reporter, p. 52.

parties must be of unknown descent and have no known heirs, for such an acknowledgment cannot affect the right of others. If the acknowledgor has any known heirs, his acknowledgment of *nasab* to another cannot be accepted.

When one person acknowledges another as the issue of his deceased father, and the two acknowledge a third, the *nasab* of the third is established, provided the two first are persons whose evidence can be accepted, but if the third should deny the second, the *nasab* of the second would not be established, and the third would take half the estate, the first a third, and the second a sixth, being the complement of the share of the first. Similarly, if the two first being of known paternity were to acknowledge a third, his *nasab* would be established, provided the two were persons whose evidence can be accepted. But in this case the denial by the third of the *nasab* of either of the other two will have no effect, and the estate of the deceased must be divided among them all in thirds.

Acknowledgment by widow of a child.

If a person were to die leaving him surviving his wife and a brother, and the widow were to acknowledge a child to be his, her share would be reduced to an eighth, and the child would take the other eighth, unless the brother should assent to her acknowledgment, when the whole of the remainder would go to the child. When the presumptive heir acknowledges another to be nearer to the deceased than himself, he must surrender to such person the whole of whatever may be in his hands that belonged to the deceased.

When a person of unknown paternity dies without having any known heirs and another person were to affirm that he was the father of the deceased, the *nasab* would be established, and the inheritance of the deceased would belong to the acknowledgor.

In this case it is not necessary that the deceased should be an infant, so long as there is sufficient disparity of age between the two.

But if the person acknowledged is equal in degree to himself, he has only to surrender out of his own share a due proportion for the share of the person so acknowledged.

In the case of a deceased person, the absence of assent does not affect the validity of the acknowledgment even though he were adult, for being dead, he comes within the rule applicable to the case of a child. So also, if a person should acknowledge an insane person to be his son, the absence of his assent is of no consequence, as no regard can be had to the words uttered by a person in such circumstances.

Section IV.

Relative Exclusion (الحجب, al hajb).

Relative exclusion is of two kinds, partial or absolute (الحجب عن بعض الفرض), or (الحجب عن الاصل).

Absolute exclusion: As a general principle, the nearer relative always excludes the more remote from succession. *Exclusion.*

(Same under the Sunni Law, in the succession of agnates.)

The direct descendant of the second degree is excluded entirely by the descendant of the first degree, without distinction of sex. For example, the daughter excludes the grandson.

When there are lineal descendants of several degrees, the nearer in the order of descent excludes the more remote.

Direct descendants exclude all other relations excepting the deceased's father and mother, husband or wife.

Brothers and sisters exclude the nephews and nieces from succession.

In the collateral line, also, the nearer excludes the more remote. Thus, the collaterals of the second class, *viz.*, brothers and sisters, and their direct descendants exclude collaterals of the third class, *viz.*, paternal and maternal uncles and aunts and their descendants.

Full blood relations exclude the consanguine relations, provided they are equal in degree.[1]

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[1] "A child excludes all persons who are related to the deceased through his parents, or one of them,—as brothers and sisters and their children, grandfathers and their parents, paternal and maternal uncles and aunts and their children, and none can participate with children in the inheritance, except the immediate parents of the deceased and a husband or wife. Upon failure of parents and children of the deceased, brothers and grandfathers succeed, a brother excluding the child of a brother, and when there are several generations together, in different degrees of descent, the nearer is always preferred to the more remote.

"Brothers and sisters and their children, however remote, exclude all those who are related through grandfathers—as paternal and maternal uncles and their children—but do not exclude the parents of these grandfathers, for a grandfather, how high soever, is always a grandfather, though when there are several generations together, in different degrees of ascent, the lowest in descent, or nearest to the deceased, is always preferred to the more remote.

"Uncles, paternal or maternal, and their children, how low soever, exclude the paternal and maternal uncles of the father; and in like manner, the children of the father's paternal or maternal uncles exclude the paternal and maternal uncles of the grandfather. Further, a person who is related to the deceased by

The principles of exclusion under the Sunni Law are analogous to those recognised by the Shiahs.

(*e.g.* Whoever is related to the deceased through another does not inherit whilst that other is living,[1] except the mother's children, who inherit with her (notwithstanding that they are related through her to the deceased) because she has no title to the whole of the inheritance. Among residuaries, persons nearest in the degree of affinity entirely exclude the more remote. Sisters are excluded by sons and daughters; grandmothers are excluded by a mother.)

A sister excludes the children of her deceased sister.

A daughter excludes the children of a deceased daughter.

Sons and daughters of a whole brother exclude half-brothers and sisters.

Full brothers and sisters are excluded by a son, son's son, and a father and grandfather.

Half-brothers and sisters on the father's side are excluded not only by the persons above-mentioned, but also by full brothers and sisters.

Half-brothers and sisters on the mother's side are excluded by a child, the child of a son, the father, and a grandfather.

All grandmothers, whether maternal or paternal, are excluded by the mother.[2]

A child *en ventre sa mère* is entitled to inherit if born alive, but if still-born, it has no title to any portion; whereas if born alive, though death should ensue immediately after its birth, its share belongs to its own heirs. If miscarriage is produced by violence, regard is to be had to any movement of the child to see whether it was born dead or alive.

Ascendants of the first degree exclude ascendants of the second degree and all collaterals.

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the father only is excluded by one who is related to him by both father and mother, provided they are equal in class and degree.

"Lastly, a relation by blood, however remote, excludes an emancipator; and, in like manner, an emancipator, or his representative in the inheritance of the freedman, is preferred to the surety for offences, and the surety for offences, is preferred to the Imâm."

[1] *E.g.*, the son's son does not inherit whilst the son is living.

[2] The principal examples of exclusion under the Sunni Law are given in the *Fatâwa Alamgîri*, Vol. VI, p 630.

A blood relation, however remote, entirely excludes a manumittor.

(Under the Sunni Law, a manumittor has precedence over the uterine relations.)

Partial exclusion, or reduction of shares, takes place in three cases:—(1) When the children of the deceased reduce the share of the widow or the husband from one-fourth or one-half to one-eighth or one-fourth;[1] (2) when they reduce the share of the deceased's mother from one-third to one-sixth; (3) when brothers and sisters reduce the share of the mother from one-third to one-sixth, though they themselves take nothing. Partial exclusion.

The reduction of the mother's share[2] effected by the presence of brothers and sisters is subject to four conditions:—(1) That there should be two or more brothers, or a brother and two sisters, or four or more sisters; (2) that they should be neither slaves nor non-Moslems, nor have been convicted of murder; if they are slaves or non-Moslems, or have been convicted of murder, they would not reduce the mother's share; (3) that the father should be existing also; (4) that they (the brothers and sisters) should be either of full blood or consanguine.

If a person die leaving both parents, and the mother be pregnant at the time, and subsequently delivered of twin male children, these children would not reduce her share from a third to a sixth.

Missing Persons.

When a person is missing from his home or country, and it is not known whether he is dead or alive, his property cannot be divided among his heirs until his death is fully established, or until such a period shall have elapsed as to remove all probability of his being still alive. His property may then be divided under the decree of the Judge among his heirs in existence at the time of the decree. Under the Shiah Law, the expiration of ten years gives rise to the presumption of death. Presumption of death when a person is missing.

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[1] A child, how low soever, and whether male or female, excludes the parents of the deceased from more than two-sixths of the estate, except in the case where, with one daughter, or two or more daughters, there is only one parent; and reduces the share of the husband or wife.

[2] The mother's share is a sixth with full or consanguine brothers and sisters, when there are two or more brothers, or one brother and two sisters not labouring under any bar against succession.

The General Rules of Succession.

General rules.

Whilst the effect of disqualification incident on infidelity and the commission of the crime of homicide is confined to the person who is the subject thereof,—so that as regards all other persons its effect is the same as if he were actually dead,—the action of the two principles of exclusion which arise from the existence of particular inheritors preferentially entitled, operates to the exclusion of a wider circle; so that a person excluded by another, may exclude others either entirely, or reduce their shares, which means, that a person who is himself incapable of deriving any benefit from his relationship to the deceased is nevertheless the means of partially excluding others.

The general rules regulating the succession of heirs may be stated shortly in the following words:—(1) The heir most nearly related to the deceased takes in preference to one more remotely connected; (2) one related by a double relationship is preferred to one connected by one tie (on the father's side); (3) whoever is related to the deceased through any person shall not inherit while that person lives; (4) when the relationship is equal, a male gets double the share of a female.

These general rules are recognised with very little variation by the Sunnis. The difference arises from the secondary position they give to the uterine relations.

Doctrine of "increase" not recognised by the Shiahs.

The doctrine of *Aul* or "increase" in force among the Sunnis is considered invalid by the Shiahs. *Increase* is a technical expression used by Sunni lawyers to signify a proportionate increase in the common divisor for the purpose of yielding the requisite number of shares. For example, if a woman leave behind her a husband, two daughters, and a mother, their respective shares would be one-fourth, two-thirds, and one-sixth. The common divisor in this case is twelve, which represents the shares into which the estate will have to be divided, three being the husband's share, eight the daughter's, and two the mother's. But three, two, and eight make thirteen. The Sunnis, accordingly, in order to give the exact number of shares to each heir, divide the property into thirteen shares.

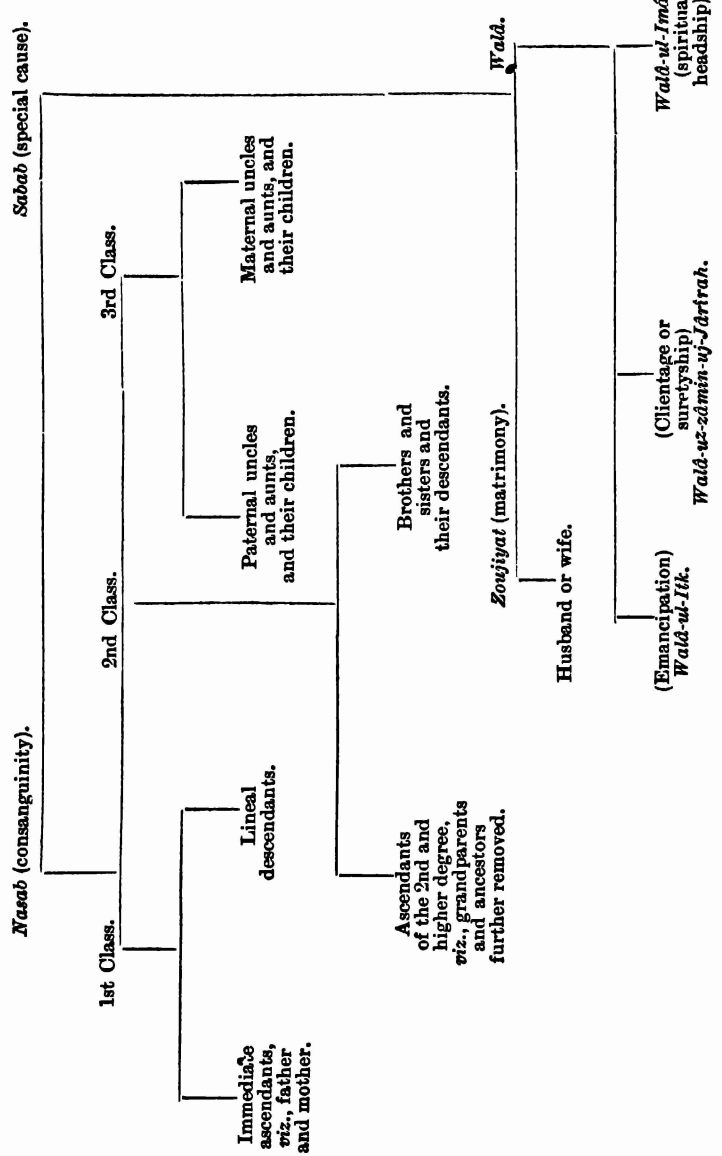
Among the Shiahs this arbitrary division of the property is not recognised. On the contrary, when they find that the property falls short in distribution of all the appointed shares, the deficiency

falls upon the heir or heirs whose share or right is liable to fluctuation or variation.[1] For example, in the above case, among the Shiahs, the mother and husband would get, their full shares, without any abatement, and the remainder, *viz.*, seven-twelfths, would be given to the daughters in equal proportions.

[1] The *Mafâtîh* and the *Rouzat-ul-Ahkâm*, both agree in holding that the deficiency falls on the daughter or daughters or on the persons (as a sister or sisters) related by both parents or by the same father alone, and not on those related on the mother's side.

The following synoptical table will illustrate the Shiah Law of Succession:—

SYNOPTICAL TABLE OF SHIAH INHERITANCE.



CHAPTER V.

THE KHOJAHS AND CUTCHI MEMONS.

In the *Spirit of Islâm* I have described the origin of the Ismaili sect and of the two divisions existing in their body. It is unnecessary, therefore, to go over the same ground here at any length. As already mentioned, both the divisions are represented in India. The Borahs of Western India are the representatives of the Western Ismailias, "*Ismailia Maghrib*," who recognise the succession of the Fatimide Imâms and Caliphs of Egypt, and whose religious head has his abode in Yemen with a deputy residing in the Bombay Presidency. A more religious-minded and thrifty community than these Borahs does not exist in India. They are all subject to the general Mussalman (Shiah) Law.

The other division called the Eastern branch owes its origin to Hassan Sabâh of Alamût, and is represented among the Khojahs of Bombay and the Hunzas of Gilgit, both of whom recognise a descendant of one of the rulers of Alamût as their religious head.

The history of the Khojah community was involved in some mystery until the year 1866 when owing to certain disputes regarding the relative rights of the head of their church and of the members of the congregation, the matter was brought for settlement before a British Court of Justice. Mr. Justice Arnold in a luminous judgment, after referring to various incidents in the history of Islâm, thus describes their origin :—

"The next question is, who and what are the Khojahs, and what have been their relations with the hereditary Imâms of the Ismailis, the ancestors of Aga Khan ?

"From the evidence adduced in this case, the more probable conclusion, I think, is that the Khojahs were originally Hindus of the trading class, inhabiting the villages and towns of Upper Sind. Their language is Sindi or Cutchi, a cognate dialect, and such ancient religious works as they possess are written in the Sindi language and character. Sind, an early Mahommedan conquest,

has long had a large Mahommedan population, but a considerable portion both of the retail and wholesale business of the country has always remained in the hands of the Hindus. The position and circumstances of these remote and isolated Hindu traders were manifestly such as to favour their conversion to some form or other of Mahommedanism.

"That they were so converted by Pir Sadrdin about 400 years ago, is admitted by both the contending parties in the Khojah community. It is also agreed that the tomb of this Pir (or saint) is at Ootch, a town of about 1,800 houses in the Native State of Bhawalpore, on the left bank of the Punjnund, the channel through which the collective waters of the five rivers of the Punjab flow into the Indus, and about 40 miles above its point of junction with the latter river. Here agreement ends. According to the traditions of the great body of the Khojah community, Pir Sadrdin came from Khorasan and was an Ismaili Dai, or missionary, sent by Shah Islam, one of the ancestors of Aga Khan, and the form of Mahommedanism which he taught his converts was the Shiah Imâmi Ismâili faith.

"The term 'Khojah' means both 'the honourable or worshipful person' and 'the disciple.' Its full meaning, as applied to the community converted by Pir Sadrdin, may, perhaps, fairly be taken to amount to this, 'the honourable or worshipful converts.'"

The Memons, too, were originally Hindus, and admittedly were converted to Islâm about three or four hundred years ago. But because these two communities were originally Hindus, they have been by the British Courts of Justice held immutably bound by Hindu customs; in other words, though Mahommedans, they are branded as Hindus. However, as the Courts have hitherto taken this view, it is necessary to refer to the cases bearing on the question.

The first case among the Khojahs in which the point was raised, whether they should be governed by Hindu customs or by the laws of their religion, arose in Bombay in 1842.[1] Sir Erskine Perry, then Chief Justice of the Supreme Court of Bombay, delivered a most learned judgment, in which he discussed at great length the force of customs. As the report of that case is not easily available, I set out here a portion of his judgment.

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[1] *Hirbai* v. *Sonabai*, Perry's *Oriental Cases*, p. 110.

"The Khojahs," said that learned Judge, "are a small caste in Western India who appear to have originally come from Sind or Cutch, and who, by their own traditions, which are probably correct, were converted from Hinduism about four hundred years ago by a Pir named Sadrdin. Their language is Cutchi ; their religion Mahommedan ; their dress, appearance and manners, for the most part, Hindu. The latter facts, however, do not warrant the conclusion being drawn, if such conclusion is necessary for the decision of the case (and I think it is not), that the Khojahs were originally Hindu, for such is the influence of Hindu manners and opinions on all castes and colours who come into connection with them, that they gradually all assume an unmistakable Hindu tint. Parsis, Mogals, Afghans, Israelites, and Christians, who have been long settled in India, are seen to have exchanged much of their ancient patrimony of ideas for Hindu tones of thought, and, in observing this phenomenon, I have been often led to compare it with one somewhat similar in the black soil in the Deccan, which geologists tell us possesses the property of converting all foreign substances brought into contact with it into its own material.

"However, this may be, the Khojahs are now settled principally amongst Hindu communities, such as Cutch, Kathiawar, and Bombay, which latter place probably is their head-quarters. They constitute, at this place, apparently about two thousand souls, and their occupations, for the most part, are confined to the more subordinate departments of trade. Indeed, the caste never seems to have emerged from the obscurity which attends their present history and the almost total ignorance of letters, of the principles of their religion, and of their own status, which they now evince, is probably the same as has always existed among them since they first embraced the precepts of Mohammed.

"Although they call themselves Mussalmans, they evidently know but little of their Prophet, and of the Koran ; and their chief reverence at the present time is reserved for Agha Khan, a Persian nobleman, well-known in contemporaneous Indian history, and whom they believe to be a *descendant of the Pir*, who converted them to Islâm. But even to the blood of their saint they adhere by a frail tenure ; for it was proved, that when the grandmother of Agha Khan made her appearance in Bombay some years ago, and claimed tithes from the faithful, they repudiated their allegiance, com-

menced litigation in this Court, and professed to the Kâzi of Bombay their intention to incorporate themselves with the general body of Mussalmans in the island. To use the words of one of themselves, they call themselves Shiahs to a Shiah, and Sunnis to a Sunni, and they probably neither know nor care anything as to the distinctive doctrines of either of these great divisions of the Mussalman world. They have, moreover, no translation of the Koran into their vernacular language, or into Guzerati, their language of business, which is remarkable when we recollect the long succession of pious Mussalman kings who reigned in Guzerat and in the countries in which the Khojahs have been located. Nor have they any scholars or men of learning among them, as not a Khojah could be quoted who was acquainted with Arabic or Persian, the two great languages of Mahommedan literature and theology: and the only religious work of which we heard as being current amongst them was one called the Dos Avatar, in the Sindi character and Cutchi language, of which Narayan, the interpreter, has procured me some translated passages, and which as professing to give a history of the tenth incarnation in the person of their saint, Sadrdin, appears to be a strong combination of Hindu articles of faith with the tenets of Islâm.

"No other fact of any material bearing on the case was proved; but the defendants brought forward evidence to show that Hirbai, the complainant in one case, and her cousin, Gungbae, the complainant in the other, had received jewels from the executrixes of Sajan Mir Ali, which, it was contended, amounted to a recognition and conformation of the will of the latter, according to the rules of Mahommedan Law. But as I was clearly of opinion on looking at the sex, the tender age, and the helpless condition of these young women, that the simple fact of receiving jewels tendered to them by their elders in the family amounted to no compromise of their just and legal rights, the fact may be passed over without further notice.

"When this case was standing over for judgment, a suit was instituted in relation to the Memon Cutchi caste, in which it was intimated that exactly the same question arose.

"In this case, also, a suit was instituted by Memon Cutchi females, praying for a distribution of the paternal property in accordance with the text in the Koran, and a plea of exactly the

same import as in the Khojah case, of a peculiar custom existing among the Memon Cutchis, was filed, upon which *vivâ voce* evidence was taken before me, by consent, in the last term.

"Amongst the Memon Cutchis, it was also clearly proved that the custom of excluding females from the inheritance prevailed exactly as it does amongst Hindus. The Memons were originally, and still are, settled in Cutch from which they have spread themselves into many of the adjoining countries in Western India, and, by their own account, even into Malabar and Bengal. By their traditions they were originally Loannas, a Hindu commercial caste in Cutch, but they are not able, and no records are forthcoming, to indicate the period of their conversion, although there is every reason to believe it must have been some hundreds of years ago. They may be characterized as being more orthodox Mahommedans than the Khojahs, and in being in every way the superiors, so far as wealth, numbers, and learning are concerned. They make the pilgrimage to Mecca, which is unknown amongst the Khojahs, and a branch of the caste, the Hala Memons, who are settled in Kathiawar, are said to observe every portion of the Mahommedan Law, including the injunction as to the division of an inheritance.

"These facts having been established, the first question which arises is, whether this peculiar custom of succession which has prevailed from time that may be called immemorial amongst these castes, can be sanctioned in a British Court of Justice? and secondly, it has been made matter of grave argument, whether any customs conflicting with the express text of the Koran can be valid amongst a Mahommedan sect. The importance of these questions, both to the castes themselves, from the large pecuniary as well as social interests involved, and as regards other castes and Courts in the interior, from the universality of the principles involved in the argument, has caused me to apply myself to the inquiry with more than usual anxiety; and as it is unlikely from the magnitude of the stakes at issue, that the parties against whom I have formed a conclusion will be satisfied with my decision, I am studious to set out the grounds of it fully, so as to enable a superior Court to judge of its validity."

Then after describing the origin of customs and their force in law and discussing other cognate subjects, his Lordship proceeded thus:—

"This brings us to the second question in the case; for it has been contended, and indeed the main stress of the argument has rested on this point, that however valid this custom might be in other respects, it can never have validity with respect to the Mahommedans, as it is in conflict with the Divine Law as revealed to them by the Koran; that in this respect it is equivalent to a custom in England which conflicts with a subsequent Act of Parliament: and the passage from Thibaut also shews that the Roman Law allowed of no custom if the *lex scripta* had laid down a rule on the subject.

"This view of the question, as bringing the binding effect of Divine Law into discussion, opens up a very interesting field of inquiry, and one on which it becomes difficult to express oneself clearly, if any regard to conciseness is to be maintained. But in a juridical point of view I apprehend there is no difficulty in stating what the sound conclusions are.

"A jurist *qua* jurist has only to deal with human laws: he recognises the existence of Divine Laws, and their validity in *foro conscientiæ* with those to whom they are addressed, or who believe in the revelation containing them; but he does not recognise them as enforceable in Courts of Justice any further than the secular power has ordained. Under a Government such as that of England, which has established the principle of universal toleration as to religious belief, it is no doubt the duty of a secular Judge to pay the utmost respect to the religious opinions of every suitor who comes before the Court; and his judicial impartiality should be preserved within such inflexible limits, that on every controversy which is capable of arising within the bosom of society, the opinion should be universally diffused that a calm and just decision between the litigant parties would as surely issue from the judgment-seat as if it were occupied by a Judge of their own creed and colour. But the question on every such occasion for the Judge would be, what the law was which had been delivered to him for administration by his sovereign." And he concluded by holding that in the two cases before him the parties were subject to the customs which prevailed in their families as part of the communities to which they belonged.

Unfortunately, the case of *Abraham* v. *Abraham* and *Jwala Bakhsh* v. *Dharam Singh*, had not been decided then, or possibly

the views of the learned Judge might, to some extent, have been modified. It is strange, however, that the case of *Hirbai* v. *Sonabai* should still be regarded as a *fetish*. But the later decisions, with a natural tendency to *Hinduise* all foreign elements have gone far beyond Sir Erskine Perry's conclusions. They have held that the Khojahs and Memons, though professedly Mahommedans, should be presumed to be subject to Hindu customs, unless they prove *some* other custom; whereas Perry, C. J., had, in the particular case before him, found in favour of the custom *dehors* the Mahommedan Law.

In the case of *Hirbai*, v. *Gorbai*[1] it was held that in the absence of satisfactory proof of a custom, differing from the Hindu Law, the Courts of the Presidency will apply to the Khojahs, the Hindu Law of Inheritance and Succession, and that if a custom opposed to Hindu Law be alleged to exist amongst the Khojahs, the burden of proof rests upon the person setting up that custom. But it was added that the Khojahs, having been originally Hindus and converted from the Hindu religion by a dai or missionary of the Imâm of the Ismâilis, to the Mahommedan religion of the Shiah division and Imâmi Ismâili sub-division, and being partly regulated by Mahommedan Law, partly by Hindu Law, and partly by custom, occupy a position so peculiar, that the Courts do not apply to them, when seeking to prove a custom of inheritance or succession differing from the Hindu Law, the stringent rule that the custom must be proved to be ancient, invariable and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khojah community. In that case it appeared that a Khojah had died intestate and without leaving any issue. He was survived by his mother (a widow), his wife, and a married sister. It was held that, according to the custom of the Khojahs, his mother was entitled to the management of his estate, and therefore to letters of administration in preference to his wife or his sister.

In *Rahmatbai* v. *Hirbai*,[2] it was held that in order to prove a custom of inheritance among the Khojah Mahommedans at variance with the rules of Hindu Law, evidence merely of the opinion of the

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[1] 12 Bom. H. C. Rs, p. 294.

[2] I. L. R., 3 Bom., p. 34.

leading members of the caste, is not enough. Instances must be proved in which the alleged custom has been observed and followed.

In another case,[1] although there was no evidence to show that the Hindu Law or custom was applicable to the particular people or the community among whom the question arose, it was "considered the settled rule in Bombay that in the absence of sufficient evidence of usages to the contrary, the Hindu Law is applicable in matters relating to property, inheritance, and succession among Khojah Mahommedans." Similarly, it was held in the cases of *Ashabai* v. *Tyeb Haji Rahimlalla*[2] and *Abdul Cadar Haji Mahomed* v. *Turner*.[3] In the first-mentioned case, Sargent, C. J., said as follows :—

"The first question of importance which presents itself for decision in this case is as to the Law of Inheritance applicable to Cutchi Memons, to which caste the parties interested belong. The ecclesiastical records of this Court show that Khojahs and Cutchi Memons have ever since the decree in the case of the Khojahs and Memons before Sir E. Perry in 1847 (*Hirbai* v. *Sonabai*) been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Mahommedanism, whilst retaining their Hindu Law of Inheritance ; and, so far as Khojahs are concerned, the decision of the Court of Appeal in the case of *Rahmatbai* v. *Hirbai* must be taken as conclusively deciding that the onus of proving a custom of inheritance not in conformity with Hindu Law lies upon those who set it up. The above records are even richer in instances of the application of Hindu Law of Inheritance to the estates of Memons than those of Khojahs, and establish a non-contentious practice extending over many years.

"I think, therefore, that in the absence of any special ground of distinction, and none was suggested, no sufficient reason exists for placing Memons on any different footing from Khojahs as regards the application of the Hindu Law of Inheritance in the absence of proof of any special custom, although undoubtedly it leaves the law, as pointed out by the Chief Justice in the above case of *Hirbai* v. *Sonabai*, in an incomplete state, which can only be satisfactorily

[1] *Shirji Havan* v. *Datu Marji Khoja*, 12 Bom., p. 281.
[2] I. L. R., 9 Bom., 115. I L. R., 9 Bom., 158.

dealt with by express legislation." And the division of certain personal effects was made on the authority of the *Mayukha* and treated as *Stridhan*.

In the second case, Mr. Justice Scott expressed himself thus :—

"The parties belong to the caste known as the Cutchi Memons, who, like the Khojahs, are Hindus by origin, converted to Mahommedanism some centuries ago. It is a well-known principle of law in India, that, when a Hindu is converted to Christianity or Mahommedanism, the conversion does not, of necessity, involve any change of the rights or relations of the convert in matters with which Christianity or Mahommedanism has no concern such as his rights and interests in, and his powers over, property—*Abraham* v. *Abraham*. As regards the Khojahs, it has been decided by this Court that in questions of inheritance they are governed by Hindu Law in the absence of any proved special custom to the contrary—*Rahmatbai* v. *Hirbai*. But the point is not so clearly settled as regards Cutchi Memons. Sir E. Perry in *Hirbai* v. *Sonabai* treated the two castes on the same footing, and decided that, by their customary law, females were not entitled to a share of their father's property at his death, as they would have been according to Mahommedan Law, but only to maintenance and marriage expenses. This ruling has been followed and strengthened in the case of Khojahs, until now they are completely governed by Hindu Law in matters of inheritance. But in the case of Memons, this Court has decided *In re Haji Ismail Haji Abdula* that the Cutchi Memons are not Hindus within the meaning of section 2 of the Hindu Wills Act (XXI of 1870), and the late Chief Justice then added : 'We know of no difference between Cutchi Memons and any other Mahommedans, except that in one point, connected with succession, it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahommedan Law." This dictum was not, however, necessary to the decision of the point before the Court ; and it has not been followed in subsequent cases. In *Ashabai* v. *Haji Tyeb* the question was raised, and the present Chief Justice distinctly ruled that Memons as much as Khojahs, although converts to Mahommedanism, still retain the Hindu Law of Inheritance."

But he proceeded to point out that in the question before him the Hindu Law was not different from the Mahommedan Law as

enunciated "in a Code prepared by a Council of Pundits from the University Mosque of el-Azhar at Cairo."[1]

And now these Khojahs and Memons are so tied down by judicial decisions to Hinduism that, unless they move the Legislature to relieve them from the opprobrium, they must remain branded as more Hindu than Moslem.

In the case of *Mahomed Sidick* v. *Ahmed Abdul Haji Abd Satoo*, it was also held that Cutchi Memons are governed by the Hindu Law of Inheritance in the absence of proof of special custom.

The applicability of the Hindu Law in its most archaic form, *viz.*, the *Mitakshara* was carried to the extremest limit in the case of *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy and another*,[2] in which Jardine, J., held that amongst Khojah Mahommedans a son was entitled to obtain a partition of the ancestral estate in his father's lifetime without his father's consent, and that by the law and custom of Khojah Mahommedans there is a distinction between ancestral and self-acquired property in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu Law.

The learned Judge also held that the presumptions of the Hindu Law apply to Khojah Mahomedans, and the burden of proving propositions opposed to that law lies on him who alleges them. And, therefore, in a suit for partition brought by a son against his father, who alleged that the customs and usages of the Khojah community in matters of partition were not identical with the Hindu Law, and did not confer on a son any right to demand in his father's lifetime a partition of the property in the father's hands, whether ancestral or self-acquired, the burden of proving the issues framed upon those allegations lay upon the defendant.

But the applicability of Hindu Law was fortunately cut down by the Appellate Court,[3] which held that the rule that Hindu Law as administered in the Bombay Presidency, in the absence of proof of custom to the contrary is the law applicable to Khojah Mahommedans, was not to be understood in its widest sense, but as confined to simple questions of inheritance and succession. And the learned Judges declared that the right of a son to partition in the lifetime of his father,

[1] I never knew of the existence of Pundits at el-Azhar!

[2] I. L. R., 12 Bom., p. 280.

[3] I. L. R., 13 Bom., p. 534.

more especially where moveable property is concerned, is one upon which the greatest doubt and difference of opinion has always prevailed, and consequently there was no presumption in favour of its inclusion in the Hindu Law, which, in the absence of proof of custom to the contrary, is applicable to Khojah Mahommedans, the onus lying on the party alleging such a right, in the case of Khojah Mahommedans, to prove it. They also held on the evidence, that it was not established that amongst Khojahs in Bombay there was any recognised right of a son to demand partition in the lifetime of his father, although it was proved to be customary in Kathiawar and Cutch for a father to give a son who wished for it his share of the family property, both ancestral and self-acquired.

And they laid down broadly that where wealth amassed in trade by an individual is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property ; it must be shown that the property inherited contributed in a material degree to the wealth so amassed ; a view somewhat different from that expressed by other Courts.

The Madras High Court refused, however, to give effect to the plea of a Hindu custom in a case which arose among the Ravathans of South Malabar, converts like the Memons from Hinduism to Islâm. One Sheitha died leaving a widow and several daughters and sons. In a suit by the widow and the daughters, for their shares of his estate under the Mahommedan Law, it was contended by the other members of the family, that, according to a special custom obtaining among the Ravathans of that part of the country adopted from Hindu Law, females were excluded from inheritance by sons and sons' sons. In two instances it was proved that women of this class had obtained shares under Mahommedan Law by suits without this plea having been put forward. The District Munsif described these cases as interruptions and found on the evidence that the custom was proved, and this decree was confirmed by the Subordinate Judge. On special appeal the High Court held that no valid custom was established by the evidence. A custom to be valid must be consciously accepted as having the force of law.[1]

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[1] *Merabivi* v. *Vellayana*, I L. R., 8 Mad , 464.

CHAPTER VI.

THE BAIT-UL-MAL.

THE term *Bait-ul-Mâl*, according to the author of the *Multeka*, is an abbreviation of *Bait-ul-Mâl-ul-Muslemîn*, literally treasury of the Mussulmans, or property of the Moslem community and public treasury.

The *Bait-ul-Mâl* consists of four departments or divisions, *viz.* :—

(1) The chamber of alms, *bait-us-sadakât*.

(2) The chamber of booty, *bait-ul-ghanîmet*.

(3) The chamber of the *kharâj*, or the tax levied upon the *Rayahs*.

(4) The chamber of uninherited property.

The revenues of the chamber of alms accrue from,

(*a*) Landed estates found without a master after a conquest, those taken from the enemy, and those of which the former proprietors remain as tenants.

(*b*) Mines, treasures, &c., &c.

The property of the chamber of the *ghanîmet* is composed of :—

(*a*) The fifth part deducted from the spoils of war (Koran, chap. viii. v. 42).

(*b*) The tithes paid by Moslems as masters of the domains granted to the conquerors at the time of the conquest, left at that period to the old proprietors, newly converted.

(*c*) The taxes paid by right of *ushr* and *zakât*.

The chamber of the *kharâj* comprises the taxes levied by the State, such as the capitation tax levied on landed property, annual tributes, the indemnities of peace, &c.

The fourth chamber contains the goods left by persons dying without an heir, or by one who has disappeared from the country.

This property corresponds to some extent to that which in European countries accrues to the State by right of escheat, waif, &c. It is necessary, however, to bear in mind that it is generally but a sort of deposit in the *Bait-ul-Mâl* as unclaimed property, and it can never be reckoned as the legitimate possession of the treasury, though in fact, it frequently remains permanently in its trust.

The revenues are employed in the following manner :—

(1) Those of the department of alms, for the exclusive benefit of poor and indigent Moslems, of orphans, widows, and travellers in distress.

For the enfranchisement of slaves, or for other acts of piety. Finally, for the payment of salaries due to the collectors of tithes and other officers.

(2) Those of the department of *ghanîmet* according to the disposition of the sovereign, who has the sole right to distribute the same; but here the Imâm is subject to rules which are impossible for him to violate, the first of which is that the booty must be employed in making public improvements and erecting new public buildings.

(3) Those of the department of *kharâj* for the benefit of the Mussulman community at large, and in defraying the expenses of the public service, in paying the salaries of Kâzis, Muftis, and the pensions of soldiers.

These revenues are also employed in the purchase of arms, horses, and other necessaries of war, as well as in the construction of mosques, bridges, roads, the cleansing of rivers, &c.

(4) Those of the department of unclaimed property, in the relief of those who are sick and poverty-stricken, the burial of the poor, the support of foundlings, in affording succour to the indigent and the helpless ; for the construction of bridges, roads, caravanserais when these have not been provided for by private endowments.

It will be seen, therefore, that the British Government in India has absolutely no right whatever to the property of the Mussulmans dying intestate in this country. The claims advanced on its behalf are consequently illegal according to the Shiah, as well as the Sunni, doctrines. The only ground on which the claim could

be based would be that the property would remain in trust in the hands of the Government for the benefit of the poor.

But the Mussulman Law insists that such property should be applied exclusively to the benefit of the Moslem poor ; and the British Government does not make the smallest pretension to apply it in the way the Mahommedan Law intends.

PART II.

THE LAW RELATING TO STATUS.

CHAPTER I.

THE CONFLICT OF LAW.

I HAVE thus far treated of the Mussulman Law of Inheritance, with special reference to the differences existing between the Shiah and the Sunni schools on that branch of the subject.

I now proceed to discuss the personal law of the Mussulmans properly so called,—the law in fact which regulates the *status* of individuals subject to the Islâmic system. Domicil.

With the exception of certain principles, the operation of which is necessarily confined to the territorial limits of Islâm, the Mussulman Law generally is a personal law ; that is, its incidents remain attached to the individual Moslem whatever the domicil, so long as he continues even outwardly faithful to the Commonwealth of Islâm. "A Mussulman," says the *Kifâya*, "is absolutely subject to the laws of Islâm, whatever the domicil."[1] This is not the case with born Mussulmans alone. As soon as a person belonging to a different persuasion changes his faith for the religion of Mohammed, or adheres to the Islâmic system, all the civil obligations and duties which the Mussulman Law imposes, and the rights and privileges which it gives, become attached to the new proselyte. According to the Mahommedan Law, therefore, a mere change of domicil, when unaccompanied by a change of system, effects no alteration in the status or legal capacity of Moslems.

It will be observed that this claim to exclusive jurisdiction is not peculiar to Islâm. At least, analogous principles are to be found in several Western systems of law. According to the Mahommedan jurists, adherence to Islâm implies allegiance to the Islâmic Commonwealth, and consequently such allegiance is the test of the

[1] *Kifâya*, Vol. II, p. 763.

civil rights and liabilities of Moslems. Under the Italian and the French Law it is the same,—allegiance instead of domicil furnishing the test of civil rights. The difficulties, therefore, which would arise from a conflict between the English and the Mussulman Law would not occur in Italy or in France. A Moslem Turk or a Moslem Persian domiciled in Italy, so long as he retained his religion, would be presumed to retain his allegiance to the sovereign of his native country, and his status and the succession to his property would be governed by the laws of his nation. But if he naturalised himself in either of these countries, without changing his faith, how would his rights and duties be regulated? Would the abandonment of his allegiance to the sovereign of his native country imply the renunciation of an adhesion to the Islâmic system? The Mussulman Law gives a categorical negative to the above question, and would insist upon his continuing subject to the jurisdiction of the laws of Islâm. The case, however, will be regarded differently by the Italian or French Law, and the Moslem who settled in France or Italy and naturalised himself there would thenceforward be subject to the laws of that country.

The *Dâr-ul-Islâm.*

Owing to the state of belligerency which existed originally between the Islâmic Commonwealth and the hostile nations of the East and the West, the early Moslem jurists, like the Christian jurists of later times,[1] divided the civilised world into two great portions,—the *Dâr-ul-harb* and the *Dâr-ul-Islâm*,—the territories of war and the territories of peace. These two divisions, one of which represented the land of infidelity and darkness, the other that of light and faith, were supposed to be always inimically inclined towards each other. But the Mahommedan Law allowed ampler guarantees of personal safety to non-Moslems who entered the territorial limits of Islâm for purposes of trade or commerce, than were recognised in Christendom. A non-Moslem entering a Moslem country was regarded as a guest, even if the *âmân* or guarantee which he received on the frontier was granted to him by an ordinary villager. He was allowed to remain unmolested in the country for a year. At the end of this period, however, he was

[1] Grotius and Puffendorf expressly excluded the Mussulmans from all community of interest with the so-called civilised Christian nations of Europe; and even later international jurists countenance the view that international law is limited to Christendom.—Woolsey, *Int. Law*, § 5.

bound to leave, or to take up definitively the status of a *zimmi* or tributary, when he became liable to the payment of the usual *kharâj* or taxes, and also became entitled to the privileges which the Mussulman Law gave to its own non-Moslem subjects.

A Mussulman going to a foreign country was always presumed to have an *animus revertendi*. He could, under no circumstance, abandon the domicil of Islâm; and if he did so, or acquired a foreign domicil in the *Dâr-ul-harb*, he was presumed to have apostatised, and the law considered him civilly dead. This rigorous stricture on the comity of nations was the natural result of the hostilities in which the Moslems became involved with the neighbouring countries after the death of the Prophet. Since, however, the Moslem sovereigns have entered into treaty-stipulations with the Christian Powers of Europe, and Christendom itself, renouncing its former bigotry, has admitted, to some extent at least, the Mussulman nations to the common enjoyment of the *jus gentium*, the rigour of the Mahommedan Law has been considerably relaxed. A Mussulman, therefore, may now acquire a foreign domicil without ceasing to be a Moslem.[1] *Animus revertendi.*

The new conditions of modern political necessities, when millions of Mahommedans are subject to non-Moslem Governments and are protected as *Mustâmins*[2] in the enjoyment of their civil rights and privileges, would also affect materially the ancient view of the Mussulman Law. Under these new circumstances, a Moslem residing in one particular dependency where the laws of Islâm are strictly in force, may remove to another part of the same empire where the Islâmic Law would be only partially recognised, and yet acquire there a permanent domicil, without contravening the spirit of the Mahommedan legislation. For example, a Mahommedan born within the territorial limits of British India may acquire a domicil in Great Britain or Ireland without ceasing to be a follower of the Faith, as a change of domicil in this case would not imply or necessarily involve a change of allegiance.

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[1] *Tableaux Gen. de l Empire Ottoman*, Vol. III, Part I.

[2] The non-Moslem subjects of a Mahommedan Government are called *Zimmis*. They are liable to the *Jazia* or capitation tax, unlike the *Mustâmins*, who are mere temporary sojourners in the *Bilâd-ul-Islâm*, and who enter the Mussulman territories under the guarantee of international rights or especial quarter accorded on the frontier of the particular State.

It would seem that the early Mussulman jurists had in view cases of this nature when they declared that whilst Moslems could not absolutely forego their original domicil, they could remove from one province to another of the same empire subject to the same sovereign.[1]

Status depends on domicil.

According to the English Law, status depends *primâ facie* on domicil, subject, of course, to various exceptions and limitations too numerous to detail. "The law of domicil," says Dicey, "affects, though it does not wholly govern, the rights" which relate to status, marriage, divorce, and movables. The status, therefore of a Mussulman temporarily residing in England would be governed by the provisions of the Mahommedan Law, unless they are in conflict with the English Law or "natural justice." His capacity for the acquisition and exercise of legal rights, and for the performance of legal acts, would depend necessarily on the law of his domicil. British India is, to all intents and purposes, in the eye of the Mahommedan Law, a portion of the *Bilâd-ul-Islâm*. And 21 Geo. III, c. 71, having expressly declared that in India the law relating to the Mahommedans shall, in all matters relating to them, be strictly and impartially administered, it may be assumed that, as far as the Indian Mussulmans are concerned, the law of their domicil would mean the Mussulman Law.

As long as a Mussulman retains his original domicil, so long his status and his personal capacity to do certain legal acts remain subject to the Islâmic Law. The moment, however, he abandons the domicil of origin, or as soon as he acquires or adopts a new domicil, he ceases to be governed by the law of his nation. For example, an Indian Mussulman when he once takes up his abode permanently in England, or shows distinctly by some conduct on his part that his stay in that country is not in the nature of a sojourn but that he has what is called an *animus manendi*, is subject thenceforward, in all matters relating to succession and personal status, to the English Law. He ceases to be under the jurisdiction of the Mussulman Civil Law. The moral and religious portions of the law remain binding upon his conscience, but his subjection to the jurisdiction of the English Law has the effect of withdrawing him from the *régime* of the law of his own nation. How far this is in

[1] *Tufâr-Khâniyè ; Tableaux Gen. de l'Empire Ottoman*, Vol. III.

accord with the spirit of the Mahommedan Law will be apparent from what has been stated before. Under the Italian, and probably under the French Law, he would remain subject to the Islâmic system, in spite of a change of domicil, so long as he retained his allegiance.[1]

So, also, a Mussulman whilst maintaining a constant association with the country of his origin, or being frequently in the habit of going to and fro, may, by establishing his business or trade in England, or by marrying an Englishwoman who does not abandon her own domicil, evince an intention of adopting a domicil different from the domicil of origin and submitting himself to the jurisdiction of the new domicil.

Lex loci rei situs.

As the *lex loci rei situs* governs all questions which relate to immovable property, the succession to the real estate of a Moslem, whether temporarily residing in England or permanently domiciled, would be governed by the law of the place where the property is situated. So also in the case of *wakfs* and *hibas* (endowments and gifts) of real property. Here, again, arises a conflict between the English and the Mussulman Law. Under the Mussulman Law, as under the Code Civil, a person cannot devise away his entire property to the prejudice of his natural heirs. Under the English Law he can. Consequently, if the property is situated in England, a Moslem, whether temporarily residing in England or permanently domiciled, can leave his entire real estate by a testamentary disposition, regardless of the claims of his heirs under the Mahommedan Law. If the disposition relates to movable property, it would be governed by the Mahommedan Law, if the testator was not domiciled in England. Would a *wakf*, however, of what are called "chattels real" in English Law be governed by the Mussulman Law or by the *lex situs*? Probably the latter. In the same way, succession to immovable property situated in England would be regulated according to the English Law, whether the deceased owner was domiciled in England or not. For example, if a Mahommedan died leaving certain real estate in this country,[2] and

[1] It has been mentioned to me by Mr Frederick Harrison, one of the greatest authorities on international law in this country, that the rules of the "Code Napoléon" have been somewhat encroached on by later practice in France, but the new Italian Code is very explicit.

[2] Art. 913. [3] This was written in England.

two sons, the elder of whom was a non-Moslem, such elder son would take the entire inheritance to the exclusion of the younger brother, despite the disqualification attached by the Mahommedan Law.

Under the English Law, real property must go to the "heir," and a man must, in order to be an heir, not only be the eldest, living, legitimate son of his father, but must be born in *lawful* wedlock, "within the state of lawful matrimony" recognised by the Law of England.[1] It will be seen, therefore, that in the succession to real estate situated in England, the descent will be regulated strictly according to the provisions of the English Law, without the least regard to the rules which govern questions of inheritance under the Mussulman Law. For example, suppose a Moslem, belonging to the section which recognises the lawfulness of polygamous unions and residing but not domiciled in England, dies leaving two children, the issue of two separate contemporaneous marriages, *viz.*, a daughter born of the first wife, and a son born of the second wife. He leaves also certain immovable property situated in England. The son, no doubt, fulfils the first condition required by the English Law, for the purpose of succeeding to the real estate of his father; that is he is indisputably "the eldest, living, legitimate son of his father." His status of legitimacy is not affected nor altered by the English Law. It depends on the law of his father's domicil, and as under the Mussulman Law the union of his parents was valid and legal, he is under the English Law, also, the legitimate son of his father. But as the English Law does not recognise the legality of contemporaneous unions, he would not be considered as "born in *lawful* wedlock," and therefore not entitled to succeed as "heir" to real property situated in England. Nor would he be entitled to transmit the right to land situated in England to his grandfather or to collateral relations.[2] And yet, being legitimate and the *nasab* being established according to the law of the father's domicil, *viz.*, the Mussulman Law, he would not be regarded as a "stranger in blood" to his father.[3]

It will be seen, therefore, that there is little or no doubt as regards the position of a Moslem domiciled in England; nor is

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[1] *Birtwhistle* v. *Vardill*, 2. Cl. and F, pp. 571—573.

[2] See *Re Don's Estate*, 4 Drew, 194; 27 L. J. (Ch.), 98.

[3] See *Skottowe v. Young*, L. R., 11 Eq., p 474.

there any question regarding the law which is applicable to the succession or disposition of real estate situated in England. The position, however, of a Mussulman temporarily resident in England requires consideration, as his status and personal capacity are entirely governed by the law of his domicil.

The Mahommedan Law recognises the lawfulness of unions between Moslems and non-Moslem females belonging to all *moral* creeds. As regards intermarriage with females practising idolatry, there is a prohibition which is explained by the degrading heathenism that prevailed among the Arabs before the promulgation of Islâm. The disastrous influence exercised by their peculiar idolatry over the people of the Peninsula led Mohammed to interdict unions between the Moslems and the pagan females with the sole object of keeping idolatry out of the Islâmic body politic. In making this prohibition he was actuated by the same motives which led the more ancient Semitic legislator to prohibit all unions between the Israelities and the Phœnicians. An union between a Moslem female and a non-Moslem, on the other hand, was forbidden for political reasons, as a non-Moslem in those days was an alien and generally an enemy, and consequently the marriage of a Moslemah with a non-Moslem meant the adoption by her of a hostile domicil and complete expatriation from her domicil of origin,—a result strongly disapproved of and reprehended by archaic communities.

But it is a mistake to suppose that under the Mussulman Law, a Moslem may marry a woman belonging to the revealed faiths *only*, by which are meant Islâm, Christianity and Judaism. Marriages are allowed between Moslems and the *Ahl-ul-Hawa* (freethinkers), the Sabæans, Zoroastrians, as well as the Jews and the Christians. A Moslem may, therefore, lawfully intermarry with a woman belonging to the Brahmo sect. Nor does there seem to be any reason why a marriage with a Hindu woman whose idolatry is merely nominal and who really believes in God should be unlawful. The Mogul Emperors of India frequently intermarried with Rajpoot (Hindu) ladies and the issue of such unions were regarded as legitimate and often succeeded to the imperial throne. What the Mahommedan Law requires is that any such union should not lead to the introduction of idolatry in a Mahommedan household.

Lex loci contractûs.

A marriage between a Moslem and a non-Moslemah celebrated in a foreign country is valid under the Mahommedan Law, if it is

performed in accordance with the requirements of the *lex loci contractûs* or the rites of the communion to which the wife belongs.

This principle of the Mahommedan Law coincides with the English Law. According to the English Law the *capacity* to contract a marriage is judged by the respective *lex domicilii* of the parties, but the form of the contract, generally speaking, is governed by the place where the contract is entered into. "Just considerations," says Phillimore, "of the immense importance attaching to the validity of that contract which is the foundation of the State and the nursery of the Commonwealth, have induced all civilised nations to recognise universally the principle *locus reget actum*." In other words, whilst the capacity of persons contracting a *de facto* marriage depends on the law of their respective domicils, the law of the place of celebration is binding as to the outward form.

Locus reget actum.

In the case of *Brook* v. *Brook*,[1] Lord Campbell laid down the law on the subject of a marriage celebrated in a foreign country in the following terms :—

"There can be no doubt of the general rule, that 'a foreign marriage valid according to the law of a country where it is celebrated is good everywhere.' But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractûs*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated."

And he added in another part of his judgment that "it is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the

[1] 9 H. L. C., p. 207.

contract is forbidden by the law of the place of domicile as contrary to religion or morality, or to any of its fundamental institutions."

In the case of *Herbert* v. *Herbert*,[1] Sir William Scott pronounced emphatically in favour of the principle that "every marriage is to be universally recognised, which is valid according to the law of the country in which it was had, whatever that law might be."

Similarly, under the Mahommedan Law, the legal capacity to enter into the marital state is governed by the Islâmic rules, but the form of the ceremony is regulated by local customs and rites. For example, the Mahommedan Law recognises the validity of a marriage between a male and a female who are *sui juris* and with reference to whose union there is no legal impediment, regardless of the particular form or mode in which such marriage is celebrated. A Mahommedan may marry a Hebrew or a Christian female, and such marriage may validly be celebrated either according to the rites or communion to which the wife belongs, or as a civil act before the officer of the State regularly authorised to perform the ceremony or register its *factum*. So long as the marriage is performed in accordance with the law of the place where it is solemnised, and there is no incapacity in the parties to intermarry, the law holds the union lawful.

Under 6 and 7 Will. IV, c. 85, and 19 and 20 Vic., c. 119, when the parties do not belong to the Church of England they may be married by one of their ministers duly authorised therefor. Under the same Statutes when the parties do not wish to have the aid of any religious rite, or when either of them happens to be a non-Christian, they may intermarry by a civil contract registered in the presence of a duly authorised officer.

All such marriages are valid under the English Law, and would be valid under the Mahommedan Law, both civil and religious.

According to the English Law the domicil of the husband is the domicil of marriage. But the mere fact of a woman marrying a foreigner does not lead necessarily to the abandonment of her own domicil and the adoption of that of her husband. It depends entirely on the intention of the parties; in other words, if there are circumstances tending to show that the woman before her marriage never

[1] Hagg., p. 271.

intended to abandon her domicil of origin, or the man led her to believe that she should retain her own domicil and remain always subject to her own laws, or that he himself would settle in her country, the mere retention by the husband of his domicil or his return thereto with or without her, would not affect her *status* or any rights created under or in connection with the contract of marriage.

Colliss v. *Hector.*

This principle was enunciated with great force in the case of *Colliss* v. *Hector.*[1] In this case a Turkish subject named Rassam intermarried in England with a lady who was born in India of English parents and had come over to England with the intention of permanently settling there. When Rassam made proposals of marriage to Mrs. Rassam, she objected to entertain them on the ground that she did not wish to spend her life at Moussul. To get over the objection, Rassam promised to reside permanently in England, and stated that he would simply go over to Moussul to realise his property there, and would then come back and settle in England for the remainder of his life. Upon the faith of that promise Mrs. Rassam became his wife. The marriage took place in a church in London, according to the rites of the Church of England.

Previous to the marriage an indenture of settlement was prepared and executed by both husband and wife, by which the former settled certain properties possessed by him on certain trusts in favour of his wife and of her children by a former marriage and of that marriage. Some time after the marriage Mr. and Mrs. Rassam went to Moussul, where they lived together for three years, and had one issue, a daughter. Mrs. Rassam returned to England and Rassam died shortly after when Mrs. Rassam was informed that before his death he had divorced her, in accordance with the Turkish Laws which rendered void the previous settlement. Mrs. Rassam had no notice of the proceeding taken by Rassam to obtain the divorce. Upon a bill by the children of Mrs. Rassam against the trustees of the settlement, the Court (Hall, V. C.) held as follows.

"As to the merits of the case, after the most careful investigation of the facts and circumstances on the part of the trustees, and their evident anxiety to leave nothing uncommunicated to the Court, which could in any way tend to establish rights founded upon the invalidity of the settlement, I have not any doubt which would

[1] I. L. R., 19 Eq., 334.

justify me in not dealing with the case upon the footing that the settlement is a perfectly valid one, and must have effect given to it. The answer of the trustees states that, according to Turkish Law, something has taken place in Turkey which has done away with the settlement, but I hold that this was, and remains and must be construed as an English settlement. It has been said that when the parties married they anticipated going to reside in Turkey, but the evidence establishes that they must have contemplated living in England. What Rassam, in his own mind, contemplated I will not say; but I am satisfied that he represented to Mrs. Rassam that he meant to leave Turkey and come to reside and be domiciled in England. The evidence of Mrs. Rassam and of independent witnesses who had conversations with Rassam, proves that he made representations to Mrs. Rassam that he would reside in this country; and that she accepted his offer of marriage upon the faith of his doing so. There is nothing in the evidence or in the letters which she wrote to induce me to think that Mrs. Rassam's evidence is not trustworthy. The settlement, therefore, being an English contract, must be expounded according to English Law, and the right of the parties of claiming under it must be recognised and dealt with according to the same law. Assuming that, by the proceedings which took place in Turkey, the marriage was by the Law of Turkey rendered null and void, and the contract and settlement became of no effect in Turkey, I must hold that the Turkish Court could not make void an English settlement in the absence of parties taking benefits under it, and, therefore, that the proceedings which took place in the absence of the plaintiffs and Mrs. Rassam are not, in this Court, worthy of any attention. But I am by no means satisfied that the proceedings in Turkey were either proper, or that they were before a Court having jurisdiction in the matter. The opinions which have been obtained in reference to Turkish Law are not worthy of consideration, for they are not based upon the English contract, but set forth in hypothetical cases. The trustees do not state that they took the opinion of English Counsel upon the validity of the settlement, having regard to what took place in Turkey, and I hold that I ought not to deal with the case in any way upon the view that the validity of the settlement and the interests of the parties to the contract have been brought into question, but that, on the contrary, I must deal with the settlement as

being a complete and perfect one, and as giving rights to parties who now claim under it."

The principle that the domicil of the husband is the domicil of marriage obtains only in a qualified shape in the Mahommedan Law, and extends to the right of the husband (unless there is any stipulation to the contrary) to insist upon the wife residing with him wherever he resides, or going with him wherever he goes. Beyond that the law does not go. If a Turkish subject were to intermarry with a Moslem female domiciled in Persia or British India, her domicil would not be changed by the marriage, nor would any contract entered into between them be governed by Turkish Law. In the same way, if a Moslem domiciled in one country were to marry a *Kitâbia*, *viz.* a woman belonging to Judaism or Christianity whose domicil was in another country, she would not, by the mere fact of her marriage lose her nationality or become subject to the Laws of Islâm to which her husband may be subject. Nor would she become subject to his personal laws, apart from any territorial law, even if they were natives of the same country. In both cases her inheritance would devolve according to her law and his according to his law. For example, being a non-Moslem she would not inherit from him, and if he is a *Sunni* he would not inherit from her. If he is a *Shiah* he may inherit from her, if her law permitted such a devolution.

Polygamy. There is great difference of opinion among the followers of Islâm regarding the lawfulness of polygamy or, more properly speaking, polygyny. A large and influential section of Islâmists hold it to be absolutely unlawful, the circumstances which rendered it permissible in primitive times having either passed away or not existing in modern times.

In Turkey, the sovereign belongs to the Hanafî church, which may be regarded as the State church; in Persia, Shiahism is the State religion. But in both countries, other creeds and faiths are treated with far greater toleration than in most European States. In British India there exists a variety of creeds and sects, each of which receives due recognition; and their followers are subject to their own laws. Among the Hindus, a man is governed by the law of the *Mitakhshara* or the *Dayabhaga* according to his religious rites, the *mantras* he pronounces, the rites he practices. Among the Mahommedans, he is a Shâfeï, Hanafî, Usûlï, Akhbâri, Mutazali

&c., according to his own religious convictions; and he is subject exclusively to the law of the school or sect to which he belongs. The differences in ritual and doctrine, though often small, divide one sect or school completely from the other. Between the Mutazali and the Usûli (Shiah)—in some respects analogous schools,—and the archaic sects there is a wide gulf; and at no point is the divergence greater than on the subject of marital relationship. The Mutazali is a strict monogamist: according to him the law forbids a second union during the subsistence of a prior contract. In other words, a Mutazali marriage fulfils in every respect the requirement of an essentially monogamous marriage as "a voluntary union for life of one man and one woman to the exclusion of all others." Mutazala doctrines.

In the case of *Brinkley* v. *the Attorney-General*,[1] Sir James Hannen pointed out that what was meant by the phrase "Christian marriage, 'marriage in Christendom' and other equivalent phrases was simply a marriage of the exclusive kind mentioned." In the case referred to, an Englishman of the name of Brinkley, temporarily residing in Japan, had married a Japanese woman *according to the laws in force in that country*. Upon a petition under the Legitimacy Declaration Act of 1858 (21 & 22 Vic., c. 93), presented by Brinkley for a declaration of the validity of his marriage celebrated in Japan, the President held as follows:—

"This case is clear from the difficulties which arose in the Mormon case and in the South African case,[2] because in both those instances it was an attempt to establish as a valid marriage one which admitted of the possibility of a marriage with another person than the first spouse. The principle which has been laid down by those cases is that a marriage which is not that of one man and one woman, to the exclusion of all others, though it may pass by the name of a marriage, is not the status which the English Law contemplates when dealing with the subject of marriage. But in this case it has been proved in the most satisfactory manner by the deposition of a Japanese professor of law, that by the Law of Japan marriage does involve this, and that one man unites himself to one woman to the exclusion of all others. Therefore, though throughout the judgments that have been given on this subject, the phrase 'Christian marriage,' 'marriage in Christendom,' or some *Brinkley* v. *Attorney-General.*

[1] 15 P. D., p. 76.

[2] *Bethell* v. *Hildyard*.

equivalent phrase, has been used, that has only been for convenience to express the idea. But the idea which was to be expressed was this—that the only marriage recognised in Christian countries and in Christendom is the marriage of the exclusive kind I have mentioned, and here it was proved that in Japan marriage is of that character. We all know that Japan has long taken its place among civilized nations, whose forms and laws and ceremonies are not to be treated as on the same footing with those of the Baralong tribe of South Africa. I have, therefore, come clearly to the conclusion that these cases do not apply, and that, as has been candidly admitted by Mr. James, a valid marriage can take place in Japan between an Englishman and a Japanese woman *according to the Law of Japan*, which would be a valid marriage in this country and everywhere else."

This case establishes the principle that a marriage though celebrated in a foreign country according to foreign rites will be recognised in England as a "Christian marriage," if the union is essentially of a monogamous character.

But the English Law does not recognise any *form* of marriage which admits of a polygamous relationship. For example, if a person domiciled in England were to marry a woman belonging to a community or people who admit and practice polygamy, *by their form of marriage*, and there is no evidence to show that the husband intended to take her as his sole wife, the English Law will not recognise the relationship so as to confer on the wife the right of succession to her husband's property in England.

Bethell v. *Hillyard.*

In the case of *Bethell* v. *Hillyard*,[1] the main question was whether a marriage contracted by an Englishman who had not abandoned his English domicil, with a South African woman of the Baralong tribe *according to their rites*, was valid under English Law, so as to give to the issue of the union a right to real property in England. The facts of the case are material for the due apprehension of the judgment, and I therefore set them out in detail.

One Christopher Bethell who was born in England had gone to the Cape of Good Hope in 1878. In 1884 he went through a form of marriage with a girl of a South African tribe according to their rites. Shortly after his marriage he was killed in a skirmish.

[1] See *post*.

At the time of his death the girl whom he had married was bearing him a child born a few days afterwards. Under the will of his father, Christopher Bethell was entitled to a life interest in certain real estate situated in England, with remainder to his children. In their default the property was to go to his eldest brother William Bethell.

Some time after the death of Christopher Bethell, William Bethell took out an originating summons in this matter, in which the trustees (the defendants) of the testator's will were respondents, asking for a declaration that he was entitled to the property on the ground that Christoper Bethell had died without leaving any issue, and on the 12th of June 1885, an inquiry was directed whether Christopher Bethell was ever married, and if so, when, and to whom, and whether he left any, and what children him surviving, and when they were respectively born. The Chief Clerk in answer to that inquiry made a certificate that Christopher Bethell in October 1883, being then a resident at Mafeking in Bechuanaland, went through the form of marriage *according to the custom of the Baralong tribe with Teepoo*, a Baralong girl, and had issue by her a female child who was born ten days after his death; that the Baralongs had not any religion, nor any religious customs, and that polygamy was allowed in that tribe; that at the time of the marriage the domicil of Christopher Bethell was English, and that, save as aforesaid, he never was married. Upon that certificate the matter came on to be heard for further consideration. It was then considered desirable that the infant child mentioned in the certificate should be represented; and in order that that might be done, the official solicitor was appointed her guardian, and notice of the order of 12th of June 1885 was served upon him in accordance with Rules of the Supreme Court, 1883, Order XVI, Rule 44, and Order IX, Rule 4. The infant had appeared by her guardian, who had taken out a summons asking that the certificate might be varied by finding that Christopher Bethell was married to Teepoo, and left one child him surviving, a girl, born on the 9th of August 1884. The evidence which had been taken by commission in Bechuanaland, was to the effect that Christopher Bethell *refused to be married in a church*, though, as stated, there was a Wesleyan church at Mafeking, and a minister; and also an English church and a clergyman at Kimberley, a large English

town not very far off; that he did not intend to remain in Bechuanaland, but to return to England; *that in none of his communications to his relations or friends had he intimated or led them to infer that he was married*, and that he called Teepoo "that girl of mine." It was also in evidence that in the Baralong tribe "each male is allowed one great wife and several concubines, who have almost the same status in the home as the great or principal wife." And Montsiou, the chief of the tribe said:—"There are those who have two, three or four wives, but the first is the principal wife." The marriage ceremony was thus described:—"When the consent of the parents has been obtained, the bridegroom slaughters a sheep, a buck, an ox, or cow. The head of the animal is taken to the bride's parents, as also is the hide, which is cleaned and softened. They are then considered married, and after the birth of the first child the number of the cattle previously agreed upon is handed over to the wife's parents." Christopher Bethell in October 1883 went through that ceremony with Teepoo, a niece of Montsiou, who in his deposition, gave this account of what took place:—

"Bethell came to me and said he wanted a woman to take and marry according to the Baralong custom. I said to him, 'You know we Baralongs have a different custom from other tribes. The custom is that during courtship and after marriage, the man when he kills an ox, sends the head to the girl's mother, so if you do this the mother will know your intentions are honourable.' Bethell said:—'Well I want to marry a Baralong, and I will do so according to Baralong custom'; also 'I am a Baralong,' I said, 'Will you not marry her in church?' He said, 'No; I am a Baralong; did you marry your wife in church, did you not also marry in the custom I am about to do?' I said, 'Very well, if that is the case you can take one,' and of a truth he did take one. He slaughtered an ox, and sent the head to Makwas, the mother of Teepoo. I then went to Makwas and said, 'Give your daughter to Bethell; you see he really means it. See, he has sent you the head.' She did, and he married exactly in accordance with our customs. There is no other ceremony taking the girl. The paying of the cattle is no part of the ceremony of marriage, and may be done years after the consummation of the marriage. Bethell took the girl to his house. Bethell gave a span of oxen and trekgoed and plough to Teepoo's father, saying, 'Plough Makwas' garden with this.' It is one of our customs for the son-in-law to plough the mother-in-law's garden, or have it ploughed. I know that Bethell really married Teepoo, and that she was his wife and not his paramour."

On the 3rd of December 1883, Christopher Bethell wrote and signed the following document making some provisions for Teepoo

and any child she might have by him :—

"I hereby desire that in the event of my decease here in Mafeking, and in the absence of any other will, Mr. E. Rowland shall take over all my arms, ammunitions, cannon, wagon, oxen, horses, and any other property that may be in my possession, and shall sell them to the best advantage. I desire that he will realize all the property as quickly as possible, and shall apply the proceeds to the payment of Taylor and Leark's (Klerksdup) account, the balance he shall have and hold as a bequest and present from me. And shall inform my relatives in England of my decease, and of the manner in which my property is disposed of. Always providing that before disposing of any of the proceeds of the sale of my property, he shall purchase or put aside (30) thirty heifers, (10) ten three years old, (10) ten two years old, (10) ten one year old, and shall use them for the benefit of Teepoo in the following manner :—He shall keep the heifers for the space of one year from my decease, and in case she (Teepoo) has no child by me he shall hand the said (30) thirty heifers over to her for her own property and use. If she has a child after my decease, he shall keep the heifers and their produce until the said child be arrived at the age of (21) twenty-one years, selling any full-grown oxen and old cows, and investing the proceeds in land or English Government securities. The milk of the cattle and the use of the young oxen to be applied to the house of Teepoo and the child. At the end of eight years the child is to be removed from its mother and placed at a school for the time of ten years, either in the colony or in England, and if a boy shall be taught a profession, or enter Her Majesty's service as a soldier. In order to repay the work of Mr. Rowland in the case of a child being born I desire that he shall take twenty per cent. of all sales of oxen and cows as before mentioned. In case Teepoo re-marries, or has any more children, or conducts herself in an improper way, she shall be debarred from any participation in the heifers and shall give up the guardianship of the child at once to E. Rowland, and shall receive ten yearly heifers only as a dowry. But in case she have no child by me at the expiration of the year, she will be at liberty to do so as she likes, and will receive the (30) thirty heifers as before mentioned. And Ragnassie, her father, shall receive eight young heifers as dowry, and thereby relinquishes by Bechuana law all command over Teepoo and the child."

Mr. Justice Stirling's judgment is as follows :—

"The question thus raised is whether a marriage valid according to English Law took place between Christopher Bethell and Teepoo, and it has been very fully and ably argued by Counsel on behalf both of the infant and of William Bethell. The facts which gave rise to it, so far as the same appear by the evidence, are shortly these : Christopher Bethell, who left England in 1878, was, shortly after the arrival in South Africa, appointed British resident with

Montsiou, the chief of the Baralongs, a barbarous or semi-barbarous tribe who inhabit a portion of Bechuanaland beyond the limits of the British dominion. That appointment was afterwards cancelled, but he continued to reside among the Baralongs and became a store-keeper at Mafeking within their territory. Upon the breaking out of the disturbances in Bechuanaland he joined the Bechuana mounted police, a corps in the employment of the British Government, and he met with his death in an encounter between that force and the Boers. At the time of his death a commission appointing him to a command in the corps had been made out, and was on its way to him, but he did not actually receive it.

"It was found by the Chief Clerk that polygamy prevails among the Baralongs. According to one witness 'each male is allowed one great wife and several concubines, who have almost the same status in the home as the great or principal wife.' And the chief of the tribe said: 'There are those who have two, three, or four wives, but the first is the principal wife.'

"Christopher Bethell in October 1883, went through that ceremony with Teepoo, a niece of Montsiou, who gave an account of what took place."

Then after referring to the will of Christopher Bethell the learned Judge proceeded:—

"Christopher Bethell kept up communication with various members of his family down to shortly before his death. He from time to time expressed his intention to return to England; and that portion of the Chief Clerk's certificate which finds that his domicil was English has not been excepted to. He never mentioned the marriage to any of his relatives, and there is no evidence that he ever introduced Teepoo, or spoke of her to any European, as his wife. One of the witnesses stated that he always called her 'that girl of mine.' Although it was not formally in evidence, it was stated at the Bar, and the statement was accepted by Counsel on behalf of the infant, that the contents of the testator's will[1] were communicated to Christopher Bethell shortly after his father's death in 1879; and that the income of the property, amounting to about £600 a year, was regularly remitted to him down to the time of his death.

[1] Meaning Christopher Bethell's father's will.

"I have now to inquire what is the law applicable to the case. In *Warrender* v. *Warrender*, Lord Brougham said: 'A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be: Did the parties intend to contract marriage? And if they did, that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. This is the general rule of the law, and is relied on by the Counsel for the infant. His Lordship, however, afterwards qualifies his statement of the rule as follows: 'The rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its constructions. If indeed there go two things under one and the same name in different countries—if that which is called marriage holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriage among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate ..... Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.' The statement of the law was acted upon by Lord Penzance in the case of *Hyde* v. *Hyde* and *Woodmansee* in dealing with the case of a Mormon marriage celebrated at Salt Lake City. He there says:[1] 'The matrimonal law of this country is adapted to the Christian marriage and it is wholly inapplicable to polygamy' and 'I conceive that marriage as understood in Christendom, may for this purpose be defined as the

[1] P. & M. p. 130.

voluntary union for life of one man and one woman, to the exclusion of all others.'

"I conceive that, having regard to these authorities, I am bound to hold that a union formed between a man and woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the Law of England, *unless it be formed on the same basis as marriages throughout Christendom*, and be in its essence 'the voluntary union for life of one man and one woman to the exclusion of all others.' Now, it is plain that Christopher Bethell intended that Teepoo should have a status different from, and higher than that of, a mere concubine. Indeed, the attempt to form such a connection with any woman of the tribe, and still more with one nearly related to its chief, would probably have been attended with unpleasant, not to say dangerous, consequences. The evidence clearly proves that Christopher Bethell intended that the relationship between himself and Teepoo should at least be that of husband and wife in the sense in which those terms are used among the Baralongs. That relationship, however, is essentially different from that which bears the same name in Christendom, for the Baralong husband is at liberty to take more than one wife; and it must therefore be determined whether the union between Christopher Bethell and Teepoo was a marriage in the Christian or merely in the Baralong sense. In my opinion, the latter alternative is the conclusion to be arrived at upon the evidence before me. *To begin with, the cohabitation between Christopher Bethell and Teepoo lasted for only a few months. During that time both resided in the Baralong country. Christopher Bethell, although he kept up communication with his relatives at home never mentioned his marriage to them. He never introduced Teepoo or spoke of her to any European as his wife. In short, there is an entire absence of that reputation of marriage (in the Christian sense) which has in many cases afforded weighty evidence of the actual existence of such a union.*[1] Next, it is to be observed that Christopher Bethell positively and emphatically refused to marry Teepoo in church, and that not on the ground that there was any difficulty in finding a place of religious worship where the marriage cere-

[1] The italics are mine to show that the gist of the judgment lies here.

mony might have been performed, but upon the allegation, which he repeated more than once, that he was a Baralong, and wished to be married according to Baralong customs. He thus desired to be regarded as being, for the purpose of relationship he was about to form, a member of the tribe. I think that the proper inference is that he meant to enter into no higher or other union than that which between members of the tribe was regarded as a marriage. This conclusion appears to me strongly confirmed by the document of the 3rd December 1883. It can scarcely be supposed that if Christopher Bethell regarded his union with Teepoo as a marriage in the sense in which it is understood among Englishmen, and the child, referred to in that document as legitimate, he would have made such provisions as are therein contained for the maintence, education, and advancement in life of the child. He was in receipt of an income of £600 a year from an estate in Yorkshire ; and he knew of the provisions of the father's will, under which a legitimate child of his would succeed to the property ; yet he directed that his child by Teepoo should be maintained and educated up to the age of twenty-one on the proceeds of thirty heifers to be purchased out of the proceeds of a sale of his property at Mafeking, to be effected by his friend, Mr. Rowland, who 'was a resident among the Baralongs.' It is true that he speaks of the 're-marriage' of Teepoo, and makes provision for the 'dowry' to be received by her, and by her father ; but, in my opinion, he used those terms in the sense in which they were understood among the Baralongs, and his instructions were directed simply to ensure the fulfilment of obligations which he conceived to be cast upon him by their laws or customs. Finally, the evidence was completed before her child was made a party to the cause, but I should willingly have listened to any application on the infant's behalf for leave to adduce further evidence. No such application has been made ; and there is nothing to show that Teepoo regarded herself as entering into any other union than such as prevails among the tribe to which she belongs, or that she would have been, or would have considered herself to be, aggrieved if Christopher Bethell had availed himself of the Baralong custom and introduced a second or third wife into his household. I am, therefore, of opinion that the union between Christopher Bethell and Teepoo was a marriage in the Baralong sense only, and was not a valid marriage according to the Law of

England. In the view which I have taken, it is unnecessary for me to express an opinion on many of the numerous points relating to the law of marriage which were discussed before me, but I ought, perhaps, to refer to two cases which were cited in support of the contention on behalf of the infant, viz., *Johnson* v. *Johnson's Administrator* and *Connolly* v. *Woolrich*. Those decisions are not, of course, binding upon me, but they are entitled to most respectful consideration, and, in the absence of direct English authority, might have exercised a weighty influence upon my decision. The former of those cases was decided in 1860, before *Hyde* v. *Hyde* and *Woodmansee* and in the latter judgment was given on the 9th of July 1867, but *Hyde* v. *Hyde* and *Woodmansee*, which was decided on the 20th of March 1866, was not referred to. I am not sure that the learned Judges who decided those cases took the same view of the law as is expressed by Lord Penzance, by which I consider myself to be bound; but in both cases the facts were very different from those in the present case: and circumstances were proved which might in my judgment, well lead to the conclusion, consistently with the doctrine laid down in *Hyde* v. *Hyde* and *Woodmansee*, that the marriages there under consideration were valid according to the Law of England."[1]

It will be seen that in the case under reference Bethell refused to marry the girl according to his own rites; that he never designated her as his wife; never introduced her as such to any of his English friends; and never communicated the fact of his marriage to his relations or friends in England. There was neither such performance as would give to the union the status of a valid marriage under the English Law, nor recognition on the part of the man that the woman was his wife in the sense in which it is understood in civilised countries. The conclusion was therefore irresistible that he had only taken the woman as a wife in the Baralong sense.

Hyde v. *Hyde* and *Woodmansee.*

In *Hyde* v. *Hyde* and *Woodmansee*, the marriage was between two Mormons in the Mormon country according to Mormon rites. After the marriage the husband went to the Sandwich Isles, and there abandoned Mormonism. He was thereupon excommunicated by his former sect, and his wife was declared free to marry again, which she did according to Mormon rites. Upon a petition by the

[1] 38 Ch. D, p. 220.

husband for a dissolution of marriage on the ground of adultery, Lord Penzance held as follows :—

"The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah, and abandoned the faith, but the respondent has not. After the petitioner had left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of. Before the petitioner could obtain the relief he seeks, some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the *lex loci*, the divorce would have to be determined void, and the petitioner's conduct in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing a strong doubt whether the union of a man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered 'husband' and 'wife' in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions.

"Marriage has been well said to be something more than a contract, either religious or civil—to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must need (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may, for this purpose, be

defined as the voluntary union for life of one man and one woman to the exclusion of all others."

Then after referring to some inconveniences more ingenious than real, which might follow in England from the recognition of polygamous unions contracted in foreign countries, His Lordship proceeded as follows :—

"In conformity with these views the Court must reject the prayers of this petition, but I may take the occasion of here observing that this decision is confined to that object. The Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons, which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the Matrimonial Law of England."

The Supreme Court of the United States.

The view of the Supreme Court of the United States is more in conformity with the requirements of the *jus gentium* and the dictates of natural justice than the enunciations of the English Law Courts. The United States Supreme Court has held that when a man belonging to a polygamous community but unmarried at the time, contracts according to the rites of his people and in his own country, a marriage with a woman belonging to the same community who also is unmarried at that time, the marriage is and ought to be held valid by the *jus gentium*.[1]

But when a marriage is contracted by an Englishman or any other person subject to monogamous rules with a woman belonging to a polygamous community according to the English form or any other form recognised among monogamous communities, such marriage would, upon the principle laid down in *Brinkley* v. *The Attorney-General*, be recognised as a marriage in the English sense. Similarly, if a man belonging to a polygamous community were to marry an English woman or any other woman belonging to a monogamous community, according to the English form or any other monogamous form, it would be recognised as a marriage in the English sense.

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[1] Bishop, Husband and Wife.

Suppose a person belonging to a polygamous community but subject to the laws of England marries according to rites recognised by the English Law, a Christian woman domiciled in England or any other woman belong to a monogamous body of people such as the Mutazala sect, can he enter into a bigamous relationship with any other woman ? I submit not, and I think the fact of his belonging to a polygamous community would make little difference in his liability to a prosecution for bigamy under the English Law. If I am right in this view, it would make no difference whether the man is domiciled in England or in a dependency of England where polygamy is recognised. For it seems to me that by entering into a marriage relationship with a woman belonging to a monogamous community according to monogamous rites, he takes upon himself all the obligations springing from a monogamous relationship.

Accordingly, it would seem advisable for a woman belonging to a monogamous community entering into a marriage with a man belonging to a polygamous community in India where polygamy is not absolutely unlawful, to marry according to rites exclusively in force among monogamous communities, or before the Registrar, and, at the same time, to obtain from the man a declaration to the effect that the union is absolutely monogamous, and that he would never have, at any time, and under any pretext, the right of contracting another lawful union during the subsistence of the first. No such declaration would be needed in the case of a marriage celebrated in England according to any form authorised by English Law.

Among Mussulmans even of the polygamous sect it is usual now-a-days to insert in the contract of marriage a clause to the effect that should the husband marry another wife, the first marriage would become *ipso facto* void, and the wife would become entitled to recover her dower as upon divorce.

In Persia, Turkey, and other Mahommedan countries generally, the State regulations insist upon the registration of marriages as well as of divorces in the books of the Kâzis. In Bengal there is an optional law for the registration of marriages and divorces. The Koran lays down certain rules for effectuating a dissolution of the marriage-contract, but does not provide for the enforcement of those rules. Accordingly, among many Islâmist communities whilst

a marriage may be contracted without the assistance of the expounder of the law, its dissolution cannot be effectuated without the sanction of the Judge or Hâkim-ush-sharaa. There seems no reason why the Indian Legislature should not frame rules, in the interests of public morality, to require all sections of Mussulmans to obtain the *imprimatur* of a Mahommedan Judge to the effectuation of a divorce.

When a man, although not a Christian, marries in England a Christian woman according to Christian rites, all the rights and obligations springing from the marriage relationship will be governed by the English Law.[1] But a purely Jewish marriage, contracted according to Jewish rites will be governed by the laws of the Jews.[2]

In *Goldsmid* v. *Bromer*, which was a suit of jactitation of marriage, instituted on behalf of Miss Goldsmid against Bromer, both parties being of the Jewish religion, on suggestion that the asserted marriage was not valid, by reason of non-conformity of the ceremony to the Jewish Law, Sir William Scott commenced his judgment with the following remarks :—

"The parties are both Jews, and both appeal to the Jewish Law, by which this question must be decided, for on the mere fact there is no question. The Jews, though British subjects, have the enjoyment of their own law in religious ceremonies ; and the Marriage Act acknowledges this privilege, by excepting them out of its provisions : to deny them the benefit of their own law, upon such subjects would be to deny to a distinct body of people the full benefit of the toleration to which they have long been held to be entitled."

Would the same principle apply to Mahommedans residing in England ? Considering that the Mahommedan Marriage Law does not require any religious ceremony, the question has little or no practical importance. Marriage among Islâmists is essentially a civil contract, and may be solemnised before a civil officer duly authorised therefor, and in the presence of witnesses. Among the Sunnis, proposal on one side and assent on the other recorded in the pre-

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[1] *Jones, falsely called Robinson* v. *Robinson* 2 Phillimore's Rep., p. 285.

[2] *Lindo* v. *Belisario*, 1 Hagg, p. 216 ; *Goldsmid* v. *Bromer*, 1 Hagg, p. 324. In both these cases though the parties were Jews and the marriage was performed according to Jewish rites, the English Consistory Court entertained the suits.

sence of witnesses is sufficient; among the Shiahs, the presence of witnesses even is not necessary. It is purely a *per verba de præsenti* contract. Suppose, however, a marriage is contracted between two Mussulmans residing in England belonging to the polygamous section, or between such a Mussulman residing there and an Englishwoman, according to the forms and rites generally practised among his sect, what would be the consequences of such an union? *In re Ullee*, the *Nawab Nazim of Bengal's infants*, it appeared that the father of the infants was the late Syud Munsoor Ullee, Nawab Nazim of Bengal. The Nawab, in 1870, came to England for the purpose of prosecuting certain claims against the British Government. On the 15th May 1870, whilst in London, Nawab Munsoor Ullee who, it appeared in the course of the proceedings, belonged to that section of the Mahommedans which recognises polygamy, and who had at the time several wives living in India, went through the ceremony of marriage with an Englishwoman, according to the forms and rites in vogue among his community. In 1875 the Nawab Nazim and the lady made a declaration before the then Lord Mayor of London in avowal of the said marriage and acknowledging the children thereof as being the Nawab Nazim's children, and the Nawab Nazim acknowledged them among his heirs according to the Mahommedan Law. In or about the year 1880 the Nawab Nizam went through a similar ceremony of marriage with another Englishwoman, and the first lady thereupon declined to live with him. The children remained in the Nawab Nazim's house, and in November 1880 were sent by him to India without the consent of their mother.

It appeared that S. Ullee and N. Ullee, the two boys, had been afterwards sent to England, and were residing with one Mr. Mowbray Walker at Forest Hill. The two girls had remained in India in the harem of the Nawab Bahadoor of Moorshedabad, the eldest son of the Nawab Nazim, and their half-brother. The Nawab died in 1884.

Upon an application by the first English wife for the custody of her children, her contention being that they were illegitimate, Mr. Justice Chitty delivered the following judgment:—

"This case presents several peculiarities, including the admission of the applicant as to the invalidity of her marriage; such

admission, however, is made with the view of establishing the illegitimacy of her children. The marriage was undoubtedly invalid according to the English Law. The Nawab was already married and had already at least one wife in his own country, when the ceremony of marriage, according to Mahommedan rites, was performed with the applicant in this country. The marriage was a Mahommedan and by consequence a polygamous marriage,[1] and not intended to be monogamous. Even if the ceremony were, according to the Mahommedan Law, a marriage binding on the husband, yet still, according to English Law, it was not a marriage binding on any spouse of English domicile, the reason being that it was not intended to be a marriage. That was so decided in the case of *Hyde* v. *Hyde*, where Lord Penzance held that the English Courts could not take judicial cognisance of a Mormon marriage. The ceremony there was celebrated by Brigham Young at Salt Lake City, and, as stated in the report, recognised as a valid marriage in the United States because both parties were single at the time of the marriage. Lord Penzance declined to adjudicate upon or give relief in respect of such a marriage, on the ground that marriage as understood in Christendom was the voluntary union for life of one man and woman to the exclusion of all other connubial unions. Lord Penzance, however, observed (p. 138) that while thus treating the so-called marriage he was not professing to decide upon any rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions. He, therefore, left the question of status according to English Law of such issue open and untouched. The same question I also am able to set aside as immaterial for the present decision, with the observation that, had I had to determine it I should have required fuller arguments upon it than I have had addressed to me on the present occasion. Upon the facts of the case it is apparent that the infants were treated as the children of the Nawab as to the two eldest (being girls born before 1875) by the joint statutory declaration of the parents made before the Lord Mayor in 1875, and as to all four by the award of the British Government in 1880 and the will of the Nawab in 1884. That the Mahommedan Law allows recognition to establish legit-

[1] The learned Judge has here fallen into a grievous error, resulting from pure ignorance. He was not aware that large numbers of Mahommedans are, by their view of the law, as monogamous as Christians.

imacy is clear from the authorities referred to by Mr. Macnaghten in his argument. To what extent the English Law would in that respect yield to the Mahommedan Law is, as already stated, an open question. The legitimisation of children by subsequent marriage, as allowed by the Law of Scotland and many European communities, is, for purpôse of International Law, recognised in this country, and has been recently extended in the Appeal Court so as to entitle a child born before wedlock of parents domiciled in Holland to share as next-of-kin under the Statute of Distributions in the personal estate of a sister born of the same parents, after wedlock. I am by no means satisfied that according to the principles of International Law as now understood, I ought to hold the infants now in question to be for the purpose of the application illegitimate, but it is immaterial to give any decision on that point. I will, however, in favour of the mother's contention, assume that the children are illegitimate, and thereby reduce the issue to the question as to the position which, according to English Law, a mother occupies in respect of children who are not legitimate." The learned Judge after mentioning that under the English Law the mother is not their guardian, and after discussing at great length the law relating to the right of the mother to the custody of her illegitimate children, held that in the case under reference she was not entitled to the right she claimed.

It will be seen that in this case the marriage was not in accordance with the form recognised in England; it was performed according to rites generally observed by the polygamous section of Mahommedans. The Nawab himself had several wives before he contracted this union, and entered into a similar relationship shortly after. As in the case of *Bethell* v. *Hillyard* already referred to, there could be no question under the circumstances that the marriage was not one which the English Law could recognise as a lawful marriage so far as the status of the wife was concerned.

But there can also be no doubt that though such a marriage may not, for certain purposes, be recognised as a valid marriage under the English Law, the issue would be regarded as legitimate.

Suppose a marriage is contracted by a Mussulman in a foreign country according to foreign rites, would it be necessary, in case of the return of the husband to his native land, to go through any other ceremony to validate the previous marriage? The French

Courts have answered this question in the negative, and their decisions are in conformity with the principles of the Mahommedan Law. A Moslem marriage is a purely civil act. Its validity depends on the legal capacity of the parties to enter into a binding contract. Proposal and acceptance are the sole essential ingredients which constitute a valid Mahommedan marriage.[1] If the man is "adult" and "discreet," that is, if he is over fifteen years of age, and is capable of understanding the nature and legal consequences of his acts—in fine, if he is not a *sarîr* (minor) or a *safîh* (*non compos mentis*); if the woman also is adult and discreet, and they both contract themselves in marriage, it is valid in law, either with or without evidence. So that an union contracted in a foreign country, before a civil officer expressly authorised to register marriages, is sufficient to constitute a valid marriage, and no fresh ceremony is needed on the return of the husband to his native country.[2]

According to the Mahommedan Law, when one of the parents is a Moslem, the child born of a mixed union should be presumed to be a Moslem. Under the English Law, a legitimate, child is presumed to belong to the communion of the father and follows his domicil. As the Islâmic system recognises the lawfulness of unions contracted between Moslems and non-Moslem females, no conflict is possible between the English and the Mussulman Law respecting the religious belief of a child born of a mixed union. For if a Mussulman were to marry a Christian woman in England according to Christian rites such marriage would be validly contracted both under the English as well as the Mahommedan Law, and the child of such union would belong to the creed of the father. If before entering into a contract of marriage, the parties should enter into a specific agreement with regard to the rearing of the children, such agreement would be valid under the Mahommedan Law, even though it may be stipulated that some of the children should be brought up as non-Moslems. But such children will be "excluded" from the inheritance of their Moslem father, by the operation of the disqualifying provisions of the Mussulman Law, unless the father were domiciled in England, or the

[1] See the Chapter on *Marriage*.

[2] See the precedents in Sautayra; all the schools are in accord on this point See the *Jâmaa-ush-Shittât*.

estate were real and situated in England. But the father may, though domiciled in the *Bilâd-ul-Islâm*, by a testamentary disposition, leave to such children and the wife not more than one-third of his entire property.

Effect of a change of domicil.

If a Moslem belonging to the polygamous section who acquires a foreign domicil in a country where polygamy is prohibited, has at the time two wives co-existing, the mere fact of a change of domicil will not annul or render void the second union, but neither the husband nor such wife will have any enforcible rights against each other. But though she may not be entitled to sue him for maintenance or restitution of conjugal rights, there is no rule of law to show that she would be precluded from sharing in his *Irs*[1] upon his decease. The right of succession possessed by her came into existence on her marriage—a marriage validly contracted and never set aside; and she would, therefore, be entitled to take a share in her husband's estate (*mîrâs*), despite the fact that the law of the present domicil did not recognise her original status.

If a Mussulman temporarily residing in England does an act which, though valid under the English Law, is invalid under the Islâmic Law, what would be its effect upon his return to his native land? For example, suppose a Moslem were to marry an idolatrous heathen woman in England—such a marriage would be valid under the English Law, but invalid under the Mahommedan Code. What would be the effect of such an union on the return of the husband to the territorial limits of Islâm? As the prohibition against Moslems intermarrying with idolatrous females was founded on special reasons which were the outcome of the times, probably the union would be recognised as lawful.[2]

Can a Moslem belonging to the polygamous section of Mahommedans contract a second marriage contemporaneously with another previously contracted under any form recognised by English law whilst temporarily residing in England? I submit not, and I should think that in doing so, he becomes liable to a criminal indictment for bigamy.

Nor can a Moslem belonging to the polygamous section once domiciled in England exercise the power on a temporary return to the *Bilâd-ul-Islâm*. This has been expressly held by the French

[1] *Irs*, inheritance.

[2] Dicey on *Domicil*, p. 224.

Courts in Algeria, and it is not unlikely that the same view would be taken by the English Courts.

Certain sections of Mussulmans give to the parties to a marriage-contract, subject to certain special conditions, the power of dissolving the matrimonial tie by their own consent or freewill. According to them, no proceeding in a Court of Justice is necessary, under the orthodox interpretation of the law.[1] Would such a Mussulman, residing in England but domiciled in an Islâmic country, have the power of dissolving the status of marriage, without the intervention of the English Divorce Court? The general course of English decisions points by analogy to the conclusion that he *cannot* do so for any purposes of the English Law; that is, the English Law will neither recognise nor give effect to such a dissolution of the marriage-tie.

As a general rule, jurisdiction in matters of divorce depends on the domicil of the husband at the time of the institution of the proceedings. In *Wilson v. Wilson*,[2] Lord Penzance said: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws." The same view of the law was enunciated by Lord Justice Brett in *Niboyet* v. *Niboyet*,[3] who stated that "the domicil of the wife, so long as she is a wife, is the domicil which the husband selects for himself," and that "the only Court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being married, on account of some act which by

Wilson v. *Wilson.*

Niboyet v. *Niboyet.*

[1] See the Chapter on Divorce.

[2] L. R., 2 P. & D., p. 435.

[3] 4 P. D., pp. 1, 13. The correctness of the ruling of the majority of the Court in *Niboyet* v. *Niboyet* and *Sottomayor v. De Barros*, has been doubted by some of the leading English jurists.

law is treated as a matrimonial offence, is a Court of the country in which they are domiciled at the time of the institution of the suit."

In the case of a marriage, essentially monogamous in its nature and fulfilling the exact conditions laid down by the learned Judge in the case of *Hyde v. Hyde*,[1] that is, "a voluntary union for life of one man and one woman to the exclusion of all others," there seems to be no principle of law which would lead the English Divorce Court to decline entertaining a suit for the dissolution of the matrimonial status upon grounds recognised by that Court. An analytical consideration of the judgment in *Hyde* v. *Hyde* would point to the conclusion that Lord Penzance, in refusing to grant the relief prayed for in that case, did not expressly or even by implication decide that the English Divorce Court would not entertain a suit for the dissolution of a *monogamous* marriage *contracted* in England by a person belonging to a persuasion other than the Christain, *domiciled* in England. On the contrary, all the cases, especially that of *Goldsmid* v. *Bromer*, show that it would grant relief in such cases. When a Moslem, belonging to the section which recognises the power of divorce in the parties, however, is only temporarily residing in England, how would the power be regulated? Supposing the Moslem husband wanted to dissolve the marriage-tie on the ground of incompatibility of temper on the part of the wife, or supposing a wife wanted a divorce for ill-usage, would the parties be entitled to dissolve the status by mutual consent, or would they be required to have a formal decree to that effect? If the marriage was celebrated in England, the English Courts would recognise no divorce granted under the jurisdiction of a purely Mussulman Court, unless such divorce was for a ground "recognised as such in this country, and the process of the foreign country was not resorted to for the collusive purpose of calling in the aid of its tribunals."[2] But if the marriage was celebrated abroad, and the parties were resident in England, even then the English Courts will refuse to recognise a divorce not obtained through a validly constituted Court of Justice.[3] So that a Mahommedan residing in England, though belonging to the section, which

Goldsmid v. *Bromer.*

[1] L. R., 1 P. & D., p. 130, *per* Lord Penzance.

[2] *Shaw* v. *Attorney-General*, L. R., 2 P. & D., 156.

[3] See *Shaw* v. *Gould*, L. R., 3 H. L., p. 55.

gives to the parties the power of dissolving the contract, cannot effect a dissolution of the status of the marriage of his own free will, though it may be valid in his own country.

If a Mussulman marry a Moslemah, the witnesses under the Mahommedan Law ought to belong to the same faith; but when the parties to the marriage-contract differ in faith, then it is not necessary that the *shâhids* (witnesses) should be the professors of Islâm.

Mussulman marriage.

Under the Mahommedan Law, as under the Scotch Law, a marriage *per verba de præsenti* is sufficient to constitute a valid contract. But if the marriage is celebrated in England, it must be performed in the mode or according to the rites or ceremonies requisite by the English Law to enter into a valid contract. The validity of the ceremony must, in fact, be regulated by the laws of England on the subject. The consent of parents or guardians, necessary under certain conditions to the validity of a Mahommedan marriage, is treated by the English Law as part of the ceremony or form of the marriage.[1] For example, whilst a Hanafî or a Shiah male or female, if *sui juris*—that is, if over fifteen years of age and possessed of discretion—can contract himself or herself without the consent of the guardian, a Shâfeï girl, though "adult and discreet," can, under no circumstance, enter into a contract of marriage without such consent. If, however, she contracted herself in marriage in England against the wishes or without the consent of her guardian, it would be valid.

Registration of a marriage.

In Algeria it has been held that the Kâzi is not bound to register a marriage between a Moslem and a non-Moslemah, but such marriage can be registered before the civil officer, who, in fact, is compelled by law to give effect to the wishes of the parties and make a record thereof in the registry office. Under the Mahommedan Marriage Registration Act, which is in force in several parts of the Province of Bengal, it is optional with Mussulmans to register their marriages; but as the Kâzis under the Act are especially appointed for the purpose of registering the marriages of the Mahommedans, they would be bound to do so if an application were made to them for the purpose. Supposing, therefore, that a Moslem either permanently domiciled in Bengal, or only

[1] *Sottomayor* v. *De Barros*, 3 P. D., pp 1–7.

temporarily resident there, married a non-Moslem woman, and applied under the Marriage Registration Act to have the contract registered, the Kâzi will have no option ; though if there had been no such law in force, or if the office of Kâzi had existed under the same conditions as under the purely Mahommedan *régime*, a refusal on his part would have been justifiable.

A curious point bearing on this part of the question came up for discussion before the Court of Algiers on the 14th of October 1874. A Mussulman resident of Algeria married a Spanish lady named Marie Moll, who had embraced the faith of Mohammed. The marriage was contracted in the presence of the Kâzi of Tlemcen. A child was born of this union, who was registered as the legitimate offspring of the husband Yusuf and the wife Marie Moll. Subsequently, on the death of her husband, Marie Moll, in her own right and that of her child, attempted to take possession of the deceased's estate, but was opposed by his brothers, who contested that the marriage contracted before the Kâzi was invalid, inasmuch as though the lady had adopted the Mussulman faith, she continued to be a Spanish subject, and that, therefore, the ceremony ought to have taken place before the Spanish Consul or the French authorities. The Court, consisting of three French Judges and two Mussulman assessors, unanimously upheld the validity of the marriage, and declared that Marie Moll and her child were entitled under the Mahommedan Law to the patrimony of Yusuf the deceased.[1]

A Mussulman, therefore, marrying a non-Moslemah in those parts of India where the Mahommedan Marriage Registration Act is in force, can do so either before the Kâzi appointed under the Act, or privately before two witnesses belonging to his or her faith. If the woman is a foreigner, the contract may be entered into either before the Consul of the State to which she is subject, or a Registrar, or an ordinary Justice of the Peace, or the Kâzi. If the marriage takes place in England or any other European country, the formalities of the *lex loci contractus* with reference to a civil marriage must be complied with. Of course, no law would prevent a Mahommedan resident in England from marrying a Moslemah or a non-Moslemah according to the terms of the Mus-

[1] 2 Sautayra, p. 126.

sulman Law *per verba de præsenti*, but no Court of Law would take cognisance of it unless the requirements of the English Law for the purpose of contracting a *valid civil marriage* were gone through.

A Mussulman domiciled in England cannot marry his deceased wife's sister; but if he were only temporarily residing in England, it is open to question whether he would be debarred from doing so. The American authorities certainly maintain that such a marriage would be valid.[1] But, according to the English jurists, it would appear that any marriage *contracted in* England within the degrees of consanguinity prohibited by the English Law, would not be regarded as valid for any purpose by the English Courts.[2]

The *patria potestas*, under the Mahommedan Law, cannot be exercised by parents resident in England over their children, unless such powers were in conformity with the provisions of the English Law.

Under the English Law, as under the Mahommedan Law, when the parties cohabit together as husband and wife there is a presumption in favour of marriage. The principle was laid down in the case of *Morris* v. *Davies*,[3] followed afterwards and re-enunciated in *Piers* v. *Piers*.[4] In the latter case the Lord Chancellor used the following important words :—

"I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lyndhurst in the case of *Morris* v. *Davies*, as determined in this House. It is not precisely the same presumption as exists in the present case ; but the principle is strictly applicable to the presumption which we are considering. He says : 'The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.' No doubt, every case must vary as to how far the evidence may be considered as 'satisfactory and conclusive ;' but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question.

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[1] See Wharton, sec. 141.

[2] Dicey, however, seems to doubt the absolute correctness of this doctrine p. 216.

[3] 5 Clark & Fin., 163.

[4] House of Lords Cases, p. 331.

"Then we have the subsequent conduct of the parties, proving beyond all question that they supposed that a valid marriage had been celebrated. The children are treated as legitimate children; the wife is treated as the lawful wife; and the conduct of the parties, from beginning to end, shows that they believed a valid marriage to have been solemnized. This is not at all shaken by the fact of a subsequent marriage having taken place in Ireland. We know that that does frequently happen without the slightest imputation on the validity of the first marriage."

And in *Sastry Velaider Aronegary* v. *Sembecoutty Vaigalie*,[1] Sir Barnes Peacock in the House of Lords thus summarised the principle, "that the presumption of marriage from cohabitation with habit and repute can only be rebutted by the clearest and most satisfactory evidence." "In *De Thoren* v. *Attorney-General*," to use the words of Sir Barnes Peacock in *Sastry Velaider*, "Lord Cairns, then Lord Chancellor, stated that the presumption of marriage is much stronger than the presumption raised with regard to other facts; and he referred to the Breadalbane case,[2] in which it was held that the presumption was one which not only might, but ought, to be drawn from cohabitation with habit and repute, although the cohabitation commenced with a ceremony which was not only invalid by reason of the real husband of the woman being alive at the time, but was known by both parties to be invalid."

"Their Lordships having come to the conclusion that Pattenier and the second plaintiff lived together as man and wife, and that Pattenier held her out as his wife, the presumption of their marriage is not lightly to be rebutted."

This principle is in accordance with the rule of the Mahommedan Law.

In the case of *The King* v. *The Inhabitants of Brampton*,[3] it appeared that two British subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating

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[1] House of Lords Cases, p. 372

[2] Law Rep., 2 H. L., 269.

[3] 10 East, 282.

clerk; which service the parties understood to be the marriage service of the Church of England, and they received a certificate of the marriage, which was afterwards lost. Lord Ellenborough held the presumption to be strongly in favour of the marriage, and Mr. Justice Grose put his decision very tersely in the following words:—

"The question is whether this were a good marriage? And in determining that, I have no objection to consider whether it be a good marriage either according to the Law of England, or according to the law of the country where it took place. Upon the former ground, I rather think that it was good by the Law of England for the reasons which have been stated by my Lord. But considered as a marriage by the law of the country where it was celebrated, I think there can be no doubt. The parties meant to be married; they went openly to a chapel in the country where they were; they found there a person appearing as a priest of the country, and they were married by him; the service was performed in French, but it was translated to the parties, and they understood it to be the marriage ceremony. From these facts the presumption would be that it was a marriage according to the law of that country, by a priest of that country cognizant of its law in that respect, and who, it must be presumed, would celebrate according to the law of his own country. There is, therefore, a fair and reasonable presumption that these parties were regularly and legally married according to the Law of St. Domingo. I should think the marriage might be sustained according to the Law of England, but I have no doubt that it is sustainable by the law of the country where it was celebrated."

The English Law does not recognise the validity of polygamous unions, but the status of the issue of such unions, if such unions are valid by the law of the parent's domicil, remain wholly unaffected. For example, if a Mussulman, domiciled in Algeria, where the Shâfeï branch of the Sunni Law is in force, married two wives, the children of the second marriage, according to the principle laid down in *Re Goodman's Trusts*[1] would be treated as legitimate, for the purpose of taking under the Statute of Distributions, albeit the English Law does not recognise a second union contemporane-

[1] 44 L. T. Reports, p. 527.

ously with the first as lawful or valid. But if a Moslem belonging to the polygamous section and domiciled in England were to contract a second marriage in Algeria the children of such marriage would apparently be excluded from the operation of the Statute.

In *Re Goodman's Trusts*, the dispute related to the personal estate of one Rachel Goodman who died domiciled in England. At the date of her death her sole relatives were the children of her two deceased brothers, Isaac and Leyon Goodman. Leyon Goodman whilst in England had cohabited with one Charlotte Smith, by whom he had several children. He removed afterwards to Holland and domiciled himself where another child (afterwards Mrs. Pieret) was born to them. Subsequent to the birth of this child, Leyon Goodman married Charlotte Smith, and under the Dutch Law the children born before marriage were legitimated.

The question then arose whether Mrs. Pieret could take as next-of-kin any share in the personal estate of the deceased under the English Statute of Distribution.

The Master of the Rolls decided against her. On appeal this decision was reversed. The judgment of Lord Justice Cotton is entremely important. His Lordship after stating the facts, proceeded as follows :—

" It is urged in support of the decision of Jessel, M. R., that the Law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who, at the time of the children's birth, are domiciled in England ; question of status depends on the law of the domicil. For this proposition there is authority. It is stated by Story, J., in his book on the *Conflict of Laws*, s. 93, that foreign jurists also generally, although not universally, maintain that the question of legitimacy or illegitimacy, is to be decided exclusively by the law of the domicil of origin. And in paragraph 93*e*, he states : ' The same general doctrine is avowedly adopted by the Courts of England,' and he refers to the opinion expressed by Lord Stowell in *Dalrymple* v. *Dalrymple*[1] that by the Law of England the status or condition of a claimant is tried by reference to the law of the country where that status originated. Moreover, in the case of *Birtwhistle* v. *Vardill*,[2] when it first came before the House of Lords in the year

[1] 2 Hagg. Consist., p. 54.

[2] 2 Cl. & F., p. 571.

1830, Alexander, C. B., when giving the unanimous opinion of the Judges who were consulted, refers with approval to the opinion so expressed by Lord Stowell, as applicable to the case before the House. In *Fenton* v. *Livingstone*,[1] Lord Wensleydale in a passage which I do not repeat without qualification, expresses himself thus: 'The laws of the State affecting the personal status of its subjects travel with them-wherever they go, and attach to them in whatever country they are resident.' Kindersley, V. C., in his judgment in *Re Don's Estate*, to which I shall afterwards refer, lays down the same rule. If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, by his domicile of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that, if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the Law of England, except in the case of succession to real estates in England, recognises and acts on the status thus declared by the law of domicile. In fact, the respondents wish to use the proposition that, in an English Act of Parliament, those only are next-of-kin or children of a deceased brother whom the Law of England recognises as legitimate, as if it were whom the Law of England would recognises as legitimate if, at the time of their birth, their domicile, that is, the domicile of their parents, had been English. *But, in my opinion, in deciding questions of legitimacy, that is, of status, the Law of England looks to the law of the actual not of an hypothetical domicile.* I am of opinion that, on principle, as by the Law of Holland, where the parents of Hannah Pieret were in fact domiciled at the time of her birth, she is legitimate, the Law of England, for the purpose of succession to personal estate, ought to hold her to be legitimate. This, on principle, is very obvious: but the cases may have established a different rule, and it is necessary to consider the authorities which were relied upon in argument in support of the decision of Jessel, M. R." His Lordship then proceeded to consider the authorities. "The case which was much discussed was that of *Birtwhistle* v. *Vardill*, which in the year 1830, and again in 1840, came before the House of Lords. All that was actually

[1] 33 L. T. Rep., O. S., p. 335; 3 Macq., p. 584.

decided in that case was, that the parents domiciled there, though by Scotch Law legitimate by reason of subsequent marriage of his parents, was not capable of taking land in England as heir of his father. The unanimous opinion of the Judges, as expressed on two occasions, was that he could not ; but Alexander, C. B., states the question to be considered as being, whether, by the Law of England, a man is heir of English land merely, because he is the eldest legitimate son of his father, and, though he gives his opinion that he is not, he, particularly in the passage to which I have already referred, treats the general question of his status, that is, of his legitimacy, as one to be determined by the law of the place where the parents were domiciled at the time of his birth. He was then delivering the unanimous opinion of the Judges who had been consulted. When the case was before the House of Lords in the year 1840 (7 *Cl. & F.* 925), Tindal, C. J., delivered the unanimous opinion of the Judges then consulted, and he stated the ground of their opinion to be that they held it 'to be a rule or maxim of the Law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother.' Tindal, C. J., does not, it is true, so distinctly as was done by Alexander, C. B., state the proposition that legitimacy must depend on the law of the country of the parent's domicil at the time of birth, but he treats the Statute of Merton as referring only to the question of the right to inherit land in England, and in 7 *Cl. & F.*, p. 932, there occurs this passage : 'The contest above adverted to was a contest between the ancient law and custom of England on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in England, canon and civil law being acknowledged and prevailing in England in all other respects with the single exception of its application to the descent of land.' The decision in that case, therefore, was not at variance with the rule which, in my opinion, is, on principle, the correct one, and the opinion expressed by the Judges strongly supports my view. But it was urged that the opinion expressed by the Judges as to the legitimacy of the son born before marriage was intended to apply only to his right to share in the personal estate of the father domiciled in Scotland, as the eldest son was admittedly legitimate by the Law of Scotland, by which the succession to the father's personal estate must be

governed. This construction would reduce to a nullity the opinion there expressed by the Judges, and, in my opinion, they did intend to express their opinion that the claimant, being legitimate by the Law of Scotland where his parents were domiciled at his birth and at the date of their marriage, must be considered as legitimate in England, except for the purpose of succession to real estate, and that this depended on a special rule of the feudal law as adopted in England. This, in my opinion, was the view taken by Lord Cranworth in *Shaw* v. *Gould*, which, however, has been quoted in a different sense. Kindersley, V. C., took the same view in *Re Don's Estate*.[1] He says : 'It appears to me that on the authorities applicable to this question the principle is this, that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country, then all other civilised countries, at least all Christian countries, recognise him as legitimate everywhere. He then refers to the case of *Birtwhistle* v. *Vardill*, and treats it as an exception to the general rule above stated by him founded on the rules of inheritance attached to land in this country. But although the decision in *Birtwhistle* v. *Vardill* is not against the appellant, and the opinions expressed in that and the other cases to which I have referred are in his favour, the case of *Boyes* v. *Bedale*,[2] and the opinions expressed by Wood, V. C., in that case are undoubtedly in favour of the decision of Jessel, M. R., in the Court below. In *Boyes* v. *Bedale* the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named, and Wood, V. C., held that a child exactly in the same position as Hannah Pieret was not entitled under this bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English Law, which, in my opinion, is correct so far as to require that this word 'children' shall be construed 'legitimate children.' But the Vice-Chancellor held that English Law recognised as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth is, in my opinion, erroneous as to children born of parents

[1] 4 Drew, p. 194.

[2] 10 L. T. Rep., N. S., p. 131 ; 1 Hem. & Mil., p. 798.

who at the time of their birth were domiciled in a country by the law of which the children were legitimate. At the end of his judgment in *Boyes* v. *Bedale* the Vice-Chancellor expressed his opinion that any claim under the Statute of Distributions would be dealt with in the same way. *Re Wrights' Trusts*,[1] also a decision of Lord Hatherly when Vice-Chancellor, is not inconsistent with the opinion already expressed by me, and explains how the children of Leyon Goodman who were born while he was domiciled in England make no claim. They, like the children excluded by the Vice-Chancellor in *Re Wrights' Trusts*, were born while their parents were domiciled in a country by the law of which no subsequent marriage of persons domiciled there could legitimate children born before their marriage. The exclusion of these children is, therefore, in accordance with the rule as to status already expressed by me. The judgment in *Re Wilson's Trusts*[2] affirmed by the House of Lords under the name of *Shaw* v. *Gould*[3] is not an authority on the questions involved in the case, for there, by the Law of England, the mother of the children had not been effectually divorced from her first husband, and her marriage with the father of the children was void, and the children were illegitimate. *Boyes* v. *Bedale*, though mentioned with approval by Kindersley, V. C., in *Re Wilson's Trusts*, is really the only decision which supports the judgment of Jessel, M. R.; and *Skottowe* v. *Young*[4] is certainly a decision in favour of the appellants. In that Stuart, V. C., held that the children of a testator domiciled abroad, who were in exactly the same position as regards legitimacy as Hannah Pieret were, under the Legacy Duty Act, liable to pay duty at the rate of 1 per cent. only; that is, as children of the testator within the meaning of that Act. Moreover, though in *Goodman* v. *Goodman*[5] the point raised on this appeal is not mentioned in the judgment, Stuart, V. C., who decided that case, and the Counsel who argued it, appear to have assumed that, if Hannah Pieret was born after her father acquired a domicile in Holland, she was to be considered as a legitimate child accord-

[1] 27 L. T. Rep., O. S., p. 213; 2 R. & J., p. 595.
[2] 13 L. T. Rep., N. S., p. 576; L. Rep., 1 Eq., p. 247.
[3] 18 L. T. Rep., N. S., p. 833; L. R., 3 E. & I., App., p. 55.
[4] 24 L. T. Rep., N. S., p. 221; L. R., 11 Eq., p. 474.
[5] 6 L. T. Rep., N. S., p. 641; 3 Giff., p. 643.

ing to the Law of England, and entitled as such under the will of the testator in that case. There is, therefore, a conflict of decisions, and, as in my opinion the decision in *Boyes* v. *Bedale* is contrary to principle and erroneous, I think that we ought not to follow that case, and that Hannah Pieret is to be treated as a legitimate child of Leyon Goodman, and as such entitled to share in the personal estate as to which Rachel Goodman died intestate, as one of her next-of-kin."[1]

[1] I have quoted from these cases at some length as the reports are not easily available in India, and because I consider it necessary Indian lawyers should have some knowledge of the decisions of the English Courts on the subject.

CHAPTER II.

THE STATUS OF LEGITIMACY.

UNDER the Mahommedan, as in all civilised systems of law, "the child follows the bed," that is, the paternity of a child born in lawful wedlock is presumed to be in the husband of the mother without any acknowledgment or affirmation of parentage on his part, and such child follows the status of the father.

According to the Sunni schools, the presumption of legitimacy is so strong, that in cases where a child is born six months from the date of marriage, and within two years[1] after dissolution of the marital contract, either by the death of the husband or by divorce, a simple denial of paternity on the part of the husband would not take away the status of legitimacy from the child.

M. Sautayra says, on this subject, that "the legal presumption is so strong in the case of a formally and legally married wife, that it produces the effect of attaching legitimacy to the children born during the continuance of the marriage, even where the parties declare that the paternity should be *ascribed* to a stranger, unless the denial is effectuated by *laân*, a formal charge of adultery by the husband against the wife."

And the disinclination to bastardise the children of a woman lawfully married to a man is carried so far that it is declared, "when there is a subsisting *firâsh* (aid) and there has been no consummation either actual or technical,[2] *e.g.*, a marriage has been contracted between a woman living in the East and a man living in the West at a year's distance from each other, and the woman gives birth to a child at six months from the date of marriage [the child being born in lawful wedlock] its *nasab* would be established in the husband of the woman," for, it is added, "it is possible the man may have come to her by the intervention of some saint or the help of some *jinn*."

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[1] See *post*.

[2] Comp. Story, 85, 879, *et seq*,

Of course this is subject to the right of disavowal on the part of the husband for want of access.

The English Law on the subject of legitimacy is analogous to the Mussulman Law.[1] According to the English Law, a child born anywhere in lawful wedlock is legitimate, unless there is evidence of non-access or the like.

The *Fatâwa Alamgiri* says :—

"Paternity does not admit of positive proof, because the connection of a child with its father is secret. But it may be established by the word of the father himself, or by a subsisting *firâsh*, that is, a legally constituted relationship between him and the mother of the child."

And then goes on to add :—

"There are three degrees in the establishment of paternity. The first is a valid marriage, or an invalid one that comes within the meaning of one that is valid.

"The effect of the first degree is to establish paternity without a claim, and to prevent its rejection by a mere denial, though it may be rejected by *laân* or imprecation, in the case of a valid marriage, but not where the marriage is invalid, but if the case does not admit of *laân*, the paternity of the child cannot be rejected."

The shortest period of gestation, according to all the schools, is six months. This period is fixed in the Koran, and consequently there is little room for divergence among the jurists. The *Radd-ul-Muhtâr* says the shortest period of gestation is six months according to all the four Imâms without difference.[2] But they differ considerably as to the longest period of pregnancy. Among the Hanafîs, two years is the longest term of gestation,[3] upon the authority of a tradition reported by Ayesha. On the other hand, Mâlik, Shâfeï and Ahmed ibn Hanbal extend the term to four years. Several others have considered the longest period to be five, and sometimes seven years.[4] The Imâms Shâfeï and Mâlik based their opinions on the legendary birth of Buer-asp, surnamed Zuhâk Tâzi, who is said to have been born in the fourth year of

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[1] *Fatâwa Alamgiri*, Vol. I, p. 727 ; *Kanz-ud-Dakâik.*

[2] Koran, chap. xlvi ; v. 14, *Radd-ul-Muhtâr*, Vol. I, p. 1027.

[3] *Durr-ul-Mukhtâr*, p 282 ; *Fatâwa Kâzi Khân*, Vol. I, p. 422.

[4] *Ibid*, p 282 ; *Fatâwa Kâzi Khân*, Vol. I, p. 422.

his conception, like Ibn Rabia and Ibn Ajlân.[1] The Shiahs, upon the basis of a decision pronounced by Ali during his Caliphate, recognise ten lunar months as the ordinary period of gestation.[2]

Mr. Baillie thinks that the ancient Sunni doctors, in laying down such long periods, had in view those abnormal conditions which "sometimes perplex the most skilful of the medical faculty in Europe." D'Ohsson and Sautayra, on the contrary, are of opinion that the old jurisconsults of the Sunni schools "were actuated by a sentiment of humanity, and not by any indifference to the laws of nature, their chief desire being to prevent an abuse of the provisions of the law regarding divorce and the disavowal of children."

Notwithstanding that the Shâfeï and Mâlikî doctrines are in force in Algeria, the Algerian Kâzis have adopted the same view as D'Ohsson, and in their decisions seem invariably to have held that ten months was the maximum term recognised by law. The Court of Algiers, by several decrees, dated the 16th of April 1861, the 13th of November 1861, and the 1st of September 1868 respectively, has supported and confirmed the Kazis' decisions.[3] Although the Hanafî jurists have laid down two years as the maximum period for gestation, it seems to me that the view of the Algerian Kâzis is in accord with the modern rule of practice among Mahommedan Doctors of Law.

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[1] The author of the *Sharîfia* ridicules these legendary stories. The author of the *Radd-ul-Muhtâr* says that certain diseases show the same symptoms as pregnancy, and that, therefore, Mâlik was misled into thinking that gestation may extend to four years; but he adopts two years as the ordinary period.

[2] *Jâmaa-ush-Shittât; Mafâtîh; Irshâd-ul-Allâmah.*

The *Sharâya* has the following on this point:—"All children born under a contract of permanent marriage appertain to the husband, upon condition of coition and the lapse of not less than six months nor more than the longest period of gestation from the time of its occurrence till the birth of the child. That period is nine months, according to the most common opinion; but some of our doctors have extended it to ten months, and this is considered to be correct. Others, again, have gone so far as to extend the period to a year; but their opinion is now abandoned." As stated in the text, the ordinary period is ten lunar months, but in exceptional cases, according to several eminent jurists, the period may extend somewhat longer.

[3] See *Tableau Gen. de l'Empire Ottoman*, Vol. III, pp. 102, 103. Under the Roman Law, the longest period of gestation was ten months. Under the Code Napoléon (Art. 312), the shortest term of pregnancy is one hundred and eighty days, and the longest three hundred days.

A child, therefore, born within the period indicated, and whilst the married parties were living together as husband and wife, is *affiliated* without any express acknowledgment on the part of the father.

"And if a man should," says the *Fatâwa Alamgiri* "marry a woman, and she is delivered of a child within six months from the day of marriage, the paternity of the child from him is not established, because conception must have taken place before the marriage; but if she is delivered at six months or more, its paternity is established, because of the subsisting *firâsh*, or bed, and the completion of the term of pregnancy, whether he acknowledged the child or remained silent, and if he should deny its birth, that may be established by the testimony of one woman bearing witness to the fact."

"If a man committed fornication with a woman and she became pregnant and he then married her; after which she gave birth to a child. If the child was born at six months or more from the date of marriage, its *nasab* would be established in the father;" *i.e.*, it would be regarded as the legitimate offspring of the woman's husband; but if it was born within less than six months, no ascription would take place, "unless the man acknowledged it to be his issue, but did not say 'it was his by fornication.'"

In other words, it is the right of the man to legitimate a child born *within* the time by acknowledging *expressly* or *impliedly* that the *conception* took place in wedlock.

As will be seen later, the Shiahs hold that in order that *ascription* should take place, (independently of acknowledgment,) the birth of the child must be six months from the date of the *consummation* of the marriage. But they agree with the Sunnis in holding that when the child is born under circumstances which give rise to the natural presumption that it is his offspring, nothing short of the proceeding by *laân* can take the status of legitimacy from it.

Similarly, the *Radd-ul-Muhtâr* says, "when there is a subsisting relationship, according to the Disciples the evidence of the midwife alone is sufficient for the establishment of *nasab*. Some have held that the evidence of a man is sufficient, but this must be if he was present at the birth."

If a man married a woman, and after marriage a dissolution of the contract took place by death or divorce, and a child was born

to the woman within six months from such dissolution, it would be affiliated to the husband of the mother, without any affirmation on his part.

Even if the woman was to say on the expiry of the prescribed period of probation that she was not pregnant, and the birth took place within six months, the child would be affiliated.

If a child be born at two years after divorce, affiliation would take place if the husband claimed the child as his own, although Kahastâni and Tahâwi are of opinion that when birth takes place *after* two years then only a claim is necessary for affiliation. But the author of the *Tanwîr-ul-Absâr*, in accordance with the text-writers, has adopted the other opinion.[1]

And, according to the *Fath-ul-Kadîr*, affiliation would take place if the husband should claim a child born two years after divorce, even though the wife should deny its being his.

If a woman be divorced before consummation, and a child be born to her at six months or less from the divorce, it will be affiliated to the husband, for the presumption is in favour of conception in wedlock.[2]

So also if a child be born after six months from date of divorce, but *within* six months from a declaration that she had completed her probation,[3] the child would be affiliated, but not if the birth took place *after* six months from such declaration.

When there has been no assertion of pregnancy on her part [at the time of the dissolution of the marriage], nor subsequent declaration that she had completed her probation, the child would be affiliated if born within nine months from the date of divorce. Abû Yusuf says that if the woman was irrevocably divorced, a child born to her at any time within two years would be affiliated to the husband; but if she was revocably divorced the period during which affiliation may take place is twenty-seven months.

A child born to an adult woman, who is observing the *iddat* incumbent on a widow, within two years from the death of her

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 1027; see *post*, p. 204.

[2] Unless disavowed.

[3] All these principles must be taken subject to the rule already stated, that the maximum period of gestation now recognised is ten months, unless there is any exceptional circumstance retarding the birth of the child.

husband, would be affiliated to her husband, whether he consummated the marriage or not, for *firâsh* is established by the contract and not by *copula*.

But if the widow, is a young girl (*as-saghira*) whose puberty is doubtful, and who made no assertion of being pregnant, and a child be born to her in less than ten months and ten days from the death of her husband, the child would be affiliated to him, because in this case there is the presumption that she was pregnant before the expiration of her *iddat* of widowhood (which is four months and ten days), and six months is the shortest time of gestation. But if the child be born at ten months and ten days or more, its conception will not be ascribed to him.

If an adult woman or adolescent girl were to admit after four months and ten days from the death of her husband, in other words, on the expiry of the *iddat* she has to observe in consequence of the death of her husband, that she was not *enceinte*, and a child should be born to her thereafter, such child would not be affiliated to the deceased husband unless the birth occurred at less than six months from such declaration, when ascription would take place.[1]

Similarly, if a woman observing *iddat* (*a muattadah*) for the death of her husband gave birth to a child at two years or more from such death, the child's paternity will not be ascribed to the deceased.

But if the birth occurred in less than two years from death or divorce, ascription would take place.

But a husband can disavow or disclaim a child born in wedlock and within the period recognised by law if cohabitation was impossible, whether the impossibility arose from disease, physical incapacity or want of access.[1] According to the *Futâwa Alamgiri*, a disavowal on these grounds requires the performance of the ceremonies which surround the proceeding by *laân*. Sautayra, however, is of opinion that a disavowal of paternity should be enforced by a simple judicial action, instituted by the husband or his representatives, against the wife or those who represent the interests of the child, and that an action instituted for the purpose of establishing illegitimacy is subject to the ordinary rules of procedure, and does not require the formalities of the *laân*. In the Indian

[1] *Futâwa Alamgiri*, Vol. II, p. 722; *Shârayа-ul-Islâm*, p. 300 *Jâmaa-ush-Shittât*; *Radd-ul-Muhtâr*, Vol. II, p. 1028; see *post*, p. 205.

Courts of Justice, the procedure would probably be the same as in declaratory suits, though before purely Mahommedan tribunals the process of obtaining a declaration of illegitimacy as contemplated in the Mussulman Law, would be more simple. The Indian Law Reports furnish no instance of a suit by a husband questioning the legitimacy of a child borne by his wife in wedlock. The cases in which the status of legitimacy has been discussed have arisen chiefly on the suit of a child, after the decease of the alleged father, to establish its right of inheritance to the paternal estate.

But even in these cases the main question has proceeded on the basis of the wife's position, whether she was legally married or not.[1] The principles formulated in the decisions of the Judicial Committee of the Privy Council, contain important and explicit declarations regarding the unwillingness of the Mussulman Law to bastardise children, when the surrounding circumstances lead to an irrebuttable inference that the child was the offspring of the father, or that he acknowledged and recognised it as such during his lifetime.[2]

Upon a careful analysis of the cases which turn upon the legitimacy of a child, it will be found that the matter in dispute invariably turns either upon the validity of the marriage of the parents, or on the proof of the fact that the child was *born in wedlock*.

There can be no question, however, that the disavowal must be effectuated by a legal proceeding, otherwise it would be of no effect.

Under the Jewish Law, the right of disavowal possessed by the husband is absolute.[3]

The Code Civil of France also permits a disavowal on the ground of the physical impossibility of cohabitation.[4] The Mussulman Law,

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[1] Comp. Dicey, *The Law of Domicil*, p. 181.

[2] *Khaja Hedayat Oollah* v. *Raijan Khanum*, 3 Moore's Indian Appeals, p. 295; *Khajurunnissa* v. *Roushan Jehan*, I L., 2 Cal. Series, P. C., p. 189. In the latter case their Lordships used the following words in dealing with the question of the child's legitimacy, as well as the position of the mother:—"Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises that the son's mother was the father's wife;" see also *Jeswant Singjee Ubby Singjee* v. *Jet Singjee Ubby Singjee*, 3 Moore's Indian Appeals, p. 445, and *Muhammad Ismail Khan* v. *Fidayatunnissa*, I. L., 3 All., p. 723.

[3] *Code Rabbinique* (Ebn-Haezer), Vol. II, p. 63.

[4] Arts. 312—318.

it will be seen, is analogous to the Roman and the French Law in recognising certain specific grounds as justifying the disvowal of a child born in lawful wedlock; those grounds being physical impossibility and want of access.

But the Mussulman Law goes further, and holds that the right of disavowal is a *terminable* right. It ceases on the occurrence of certain contingencies which the law always keeps in view.

If the father has taken part in the customary ceremonies,[1] which in a Mussulman family attend a birth; or has, by his conduct, led people to believe that he considered the child his legitimate offspring; or has accepted their formal congratulations, then his right to deny its legitimacy falls to the ground,[2] unless he can prove, that at the time he was unaware of his wife's infidelity.

If the husband is on the spot, and is aware of his wife's confinement, the Mâlikîs allow him two days, and the Hanafîs a week, for the purpose of disavowal.[3] Among the Hanafîs, the lapse of a week implies the performance of all the ceremonies attending the birth, and therefore, should no denial take place within that period, the presumption, of course, is that the husband has no ground to question the legitimacy of the child.

"The right of rejection," says the *Fatâwa Alamgiri*, "continues only until the husband has expressly acknowledged the paternity of the child, or has made some manifestation of acquiescing in it, by the acceptance of congratulations, or the purchase of things necessary in connection with its birth; or a long time has elapsed with knowledge of the event; or until something has happened that cannot

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[1] Such as the *akîka*, &c.

[2] *Fatâwa Alamgiri*, Vol I, p. 703; *Sharâya*, p. 346.

"When a man has denied the child of his wife after its birth, or at the time when he is accepting congratulations, or when the necessaries" (connected) "with the birth are being purchased, his denial is valid, and the *lâân* should be administered to him; but if he should not deny it until after this, though the *lâân* would be still administered to him, the *nasab* (of the child) would be established (in him). But if he were absent from his wife, and not aware of the child's birth until informed of it, he would have, according to Abû Hanîfa, as much time for denial as is occupied with congratulations; or, according to the two (Disciples), the whole period of the *nifâs* after receiving the intelligence."—*Fatâwa Alamgiri.*

[3] *Tab. Gen. de l'Empire Ottoman*, Vol. III, p. 103.

be undone, as, for instance, the commission of an offence by the child, and the imposition of a fine in consequence on the *akîlah* of the father."

"In fixing the length of time which precludes the father from denying the child, regard is to be had to custom; and if a time has elapsed after which it is not usual for a father to deny his child, the denial would not avail, according to Abû Hanîfa by one report, though by another he left it to the discretion of the Judge; while Abû Yusuf and Mohammed fixed it at forty days, after which the denial would not be valid."

"If the delivery be of twins," says the *Hedâya*, "and one is born a day within the six months, and the other a day beyond them, the paternity of neither is established.[1] If a dispute should arise between the husband and wife, he saying, 'I married thee since four months,' and she saying, 'since six months,' the word of the wife would be preferred, and the paternity of the child would be established, because appearances testify in her favour, the birth being apparently in consequence of the marriage."

If the husband is absent, the law gives him as much time as would be usually occupied with congratulations, from the receipt of the information concerning his wife's confinement.

Shiah doctrine. Period of disavowal.

Among the Shiahs, the term allowed to the husband for the purpose of disavowing a child is forty days (the whole period of the *nifâs*); whether the husband is on the spot or is absent from his wife. In the latter case, the period commences from the moment he receives the information of the child's birth.[2]

Legitimatio per subsequens matrimonium.

According to the Law of England, of the Northern States of America, and of all countries where the English Common Law is in force, antenuptial children or children born before the marriage of the parents cannot be legitimated by the subsequent marriage of the parents. According to the Scotch Law, and that of most countries which have adopted, or have been influenced by the Roman Law, as the Law of France, such children are legitimated by the subsequent marriage of the parents. These systems of law, in short, recognise and allow what is technically called *legitimatio per subsequens matrimonium.*

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[1] This must be read with the qualifications in the *Radd-ul-Muhtâr.*

[2] *Tab. Gen. de l'Empire Ottoman*, Vol. III, p. 103; *Jâmaa-ush-Shittât.*

Not recognised in Mahommedan Law.

The Mahommedan Law on this point bears the closest analogy to the English Law. Like the English Common Law, it does not recognise the legitimation of antenuptial children by the subsequent marriage of the parents; but it goes further than the English Law in refusing to attach the status of legitimacy to any children not *conceived*, though born, in wedlock. Under the English Law, a child *born in lawful wedlock* is legitimate, though its conception may have taken place before the actual marriage. The Mahommedan Law, on the contrary, insists that the intercourse between the parents, of which the child is the fruit, should, in order to render him *legitimate*, take place under a lawful contract. "If a man," says the *Fatâwa Alamgiri*, "should commit *zina*[1] with a woman, and she should become pregnant, and he should then marry her, and she be delivered of a child *within* six months of the marriage, its paternity from him would not be established, unless he should claim it, and should not say, 'It is of fornication'; but if he should say, 'It is mine by fornication,' parentage would not be established."[2] So also the *Hedâya*, "If a man marry a woman, and she bring forth a child *within* less than six months from the date of marriage, the parentage of the child is not established in the husband, as pregnancy in that case appears to have existed previous to the marriage, and consequently cannot be derived from him."[3]

Muhammad Allahdad Khan v. *Muhammad Ismail Khan.*

In the case of *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*,[4] the Allahabad High Court appears to have had this principle in view, but there seems to be so much confusion of ideas in the decision that the observations of the learned Judges must be received with considerable qualification.

Shiah doctrines.

The (Shiah) *Sharâya-ul-Islâm* and *Jâmaa-ush-Shittât* declare that "if a man should have carnal connection with a woman, get

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[1] Fornication.

[2] *Fatâwa Alamgiri*, Vol. I, p. 727; *Fatâwa Kâzi Khân*, Vol. I, p. 421.

[3] *Hedâya*, Vol. I, p. 382.

[4] I. L., 8 All., 234. Petheram, C. J., seems to have thought that, according to the Mahommedan Law, the effect of an acknowledgment by a Mahommedan that a particular person, born of the acknowledgor's wife before marriage, is his son in fact, though the acknowledgor may never have treated him as a legitimate son or intended to give him the status of legitimacy, is to confer upon such person the status of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledgor's son in fact; which is, I submit, an incorrect notion.

her with child, and then marry her, there would be no *nasab* between him and the child."[1]

Two points deserve attention in the dicta given above. Not only is there a great divergence between the Sunni and the Shiah Law, but a certain amount of difference is observable between the views entertained by the *Fatâwa Alamgiri* and the *Hedâya*, though, on careful consideration, it will be seen that the difference is more apparent than real. The Shiah Law excludes all possibility of a child being affiliated to the father if the conception had taken place *before* marriage. The *Fatâwa Alamgiri* holds that when the conception takes place before marriage, and the child is born *within* six months of that time, it is not legitimate; by implication, therefore, it leads to the conclusion that in the converse case, that is, when it is conceived before marriage, but is born *after* six months, it would be legitimate. It thus gives the benefit of the doubt to the child. The *Hedâya* apparently proceeds on a different basis, but in its result it coincides with the ruling of the *Fatâwa Alamgiri*. It seems to hold that, as the shortest period of gestation is six months, if a child is born *within* that time, it cannot be supposed to be the child of the husband, and its parentage must be ascribed to another person, *unless the husband claims it as his own.*

As a general rule, therefore, it may be said that the Shiah is stricter than the Sunni Law, for whilst the latter recognises, as legitimate, children born at six months from marriage, even though conception may have taken place before marriage, the Shiah Law attaches the status of legitimacy only to such children as are *actually conceived* in wedlock.[2]

In *Ahmad Hoosain Khan* v. *Hyder Hoosain Khan*,[3] the Judicial Committee of the Privy Council expressly laid down the principle that under the Mahommedan Law "the presumption of legitimacy from marriage follows the bed and is not antedated by relation." This principle, however, which only proves what has already been stated, namely, that the Mussulman Law does not recognise the doctrine of *legitimatio per subsequens matrimonium*, must be taken with the limitations mentioned.

Ahmad Hoosain Khan v. *Hyder Hoosain Khan.*

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[1] *Sharâya*, p. 300.

[2] *Jâmaa-ush-Shittât; Mafâtîh; Irshâd-ul-Allâmah; Sharâya.*

[3] 11 Moore's Indian Appeals, p. 94.

Semblable contracts of marriage.

The children of *semblable* contracts of marriage are legitimate under the Mahommedan Law.

Under the Code Napoléon, when a contract of marriage is entered into in good faith, the children of such marriage are legitimate in the eye of the law, though the union may be declared null and void subsequently.[1]

"An invalid marriage," says the *Fatâwa Alamgiri*, "is like a valid marriage in some of its effects, one of which is the establishment of parentage."[2]

The subject of invalid marriages, unions that are merely invalid (*fâsid*) but not void (*bâtil*) *ab initio* under the Hanafî Law, will be dealt with later in detail, but it may be stated here that the issue of invalid marriages are without question legitimate according to all the sects.

For example, if a man were to marry an idolatress, the marriage would be only invalid, for she might at any time adopt Islâm, and thus remove the cause of invalidity. The children of such marriage, therefore, would be legitimate. A non-Moslem may marry a Moslemah. The marriage would be only invalid for the same reason, and the issue of the union would be legitimate.[3]

A man belonging to the polygamous section might marry first one sister, and thereafter, whilst the first marriage is subsisting, might marry another sister. The marriage with the second sister would only be invalid, for the first might either die or be divorced, when an union with the second would be lawful. The issue, therefore, of the union with the second sister would be legitimate, and would be entitled to succeed to the inheritance of their father along with the children born of the first mother.

The Hanafî Law gives further details regarding the affiliation of children born of *semblable* relationships.

It divides *semblance* (*shubh*) into three categories,—(1) *Semblance in the fact*; (2) *Semblance in the subject*; and (3) *Semblance in the contract*.

An example of *semblance in the fact* is given by a man cohabiting with his divorced wife, who has been absolutely separated before

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[1] Arts. 201 and 202.

[2] *Fatâwa Alamgiri*, Vol. I, p 722; *Radd-ul-Muhtâr*, Vol I, p. 577. The six months will run from *copula* and not from marriage

[3] *Radd-ul-Muhtâr*, Vol. II, p. 574, from the *Muhît*.

the expiration of her term of probation. The issue of such connection would be affiliated to the father.

If the *iddat* had expired, there would be no *semblance* even of this kind; and all are agreed that the parties would be liable to the *hadd* (the punishment for adultery) "even though the husband had recalled his wife after the triple repudiation."

An example of the second kind of *semblance* is given by a man cohabiting with a woman whom he had completely repudiated by any of the *kinâyèt*, or ambiguous expressions.[1]

In such case there is no infliction of the *hadd*, even though the man should not claim that he thought the intercourse to be lawful, and the paternity of the offspring is established if claimed by him.

The third kind of *shubh*, or *semblance* is that to which I have already referred, *viz.*, that which is established by a contract of marriage. According to Abû Hanîfa, it is established whether the contract be lawful or unlawful, and "whether all are agreed as to the illegality, or there is a difference of opinion on the subject, and whether the party be conscious of the illegality or not." *Shubhat-ul-akd.*

According to the Disciples, there is no *semblance* when the marriage is one which is universally recognised as unlawful. For example, if a man were to contract a marriage with a female related to him within the prohibited degrees,[2] or the wife, or the *muattadah* of another man (*i.e.*, a woman whose marriage was dissolved either by death or divorce, but who had not completed her period of probation), with or without the knowledge that she was prohibited to him or was the *muattadah* of another man; and if a child is born, that child, according to Abû Yusuf and Mohammed, will not be affiliated, unless in the case of a marriage with another man's wife or *muattadah*, there has been what is called *ghurûr* or "deception" on one side or the other.[3]

But where there is no inherent bar to a valid union, the mere existence at the time of the marriage of some accidental circumstance will not render the union void, and the issue of the union will consequently be legitimate. I have already given examples of this principle, and it is unnecessary to dwell upon it any longer.

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[1] In this case there was a difference of opinion among the Companions, the Caliph Omar holding the repudiation to be reversible—*Hedâya*, Vol. II, p. 22.

[2] Mahârim, pl. of *Mahram*.

[3] *Inâya*, Vol. II, p. 462 ; the *Kâfi*.

Ghurûr.

Ghurûr or Deception.—The instances of "deception" given in the law-books spring from the social conditions of the people and the seclusion of women. Among most Eastern races, it is not customary to see the future wife before the marriage; and this custom, though opposed to the express sayings of the Prophet, prevails among most Mahommedan communities. Hence, oner ule about *ghurûr* is thus stated: "If a strange woman be introduced to the bed of the bridegroom who is assured by her female attendant that she is the bride, and cohabitation ensue, the man would not be liable to punishment for adultery, and the issue, if any, will be affiliated to the father; and the woman should have to go through the probation." But a casual relationship by a married man with a strange woman would not relieve him from punishment, even though he may assert he understood she was his wife.[1]

When a trustworthy person has informed a woman that her absent husband is dead, or that he has repudiated her three times, or a letter of *talâk* (or repudiation) has come to her from him by the hands of a trustworthy person, and she has a strong conviction of its truth, she need be under no apprehension in keeping *iddat* and, upon expiration thereof, marrying another man.

In like manner, if a woman should say to a man, 'My husband has repudiated me, and my *iddat* is past,' he need be under no apprehension in marrying her; and if she should be delivered of a child at more than six months from the marriage, the paternity is established in him.[2] But if a man married a woman knowing that she was the wife of another (which marriage was still subsisting to his knowledge), and she should bear a child to the second husband, the child would not be affiliated to him, though she may have told him that she was unmarried or divorced. But if A were to marry B knowing that she was married to C, on C's assurance that he had divorced her, the issue of such an union would be legitimate, even though it may turn out that the assurance was untrue.

The *Fatâwa Alamgiri* lays it down as a general principle that where it is not incumbent on a woman to observe the prescribed period of probation, the descent of her child from her husband is not established unless it be known for certain that it was begotten

[1] It is important to bear in mind that when there is no punishment, the children are legitimate. *Ghurûr*, in fact, covers cases in which the parties have acted *bonâ fide*.

[2] *Durr-ul-Mukhtâr*, p. 274.

by him—by its being born at six months ; and where it is incumbent, the descent of the child from her husband is established unless it be known for certain that it was not begotten by him,— "by reason of its being born at more than two years."

When a divorce takes place after cohabitation any child born within two years of the divorce is affiliated to the father. "If the birth should take place at more than two years, and the divorce were revocable, the child's descent would still be established, and the repudiation would be held to have been revoked. And even though the repudiation had been irrevocable, still the descent of the child from the husband would be established if it were claimed by him."

Similarly, in the case of a posthumous child born of the womb of the deceased's wife, it is affiliated to the husband if the birth takes place at any time within two years from the death. And the law is so jealous in preserving legitimacy that even where the man has died before actual cohabitation but after marriage, and a child is born within that period, the child would be regarded as legitimate. Of course the presumption in both cases may be rebutted, but the evidence in the first case, *viz.*, where consummation has take place, must be strong to displace the presumption of law. It must be remembered that whether cohabitation has taken place or not (after marriage), the wife has to observe the *iddat* after the death of the husband to see whether she is or is not *enceinte*. If the woman were to make a declaration at any time when the *iddat* may reasonably be supposed to have expired, that the *iddat* had been completed, whether it were for death or for divorce, and she were subsequently delivered of a child, the paternity of the child would not be established unless it was born in less than six months from the date of the declaration, for there might possibly be a mistake on the part of the woman in supposing she was not *enceinte*, and yet it may not be right to give her the longer term.

If a widow or divorcée were to contract a second marriage before the expiration of her *iddat*, and were to have a child two years from the date of her divorce, or from the death of the first husband, and at less than six months from her marriage with the second, the child would belong to the first because the second marriage is invalid.[1]

[1] *Durr-ul-Mukhtâr*, p. 279 ; the delivery, in the circumstances, being evidence that she was pregnant, and therefore in her *iddat* at the time she contracted the marriage.

But if the delivery is at more than two years from the divorce or death, and at six months or more from the second marriage, that marriage is lawful, and the child belongs to the second husband. If, again, the birth is at more than two years from the first event, and at less than six months from the second, the child is not affiliated either to the first husband or to the second.

The second marriage, notwithstanding, is lawful, according to Abû Hanîfa and Mohammed. Because the birth of the child being at more than two years from the dissolution of the first marriage, it is evident the woman was not pregnant, and therefore not in her *iddat* at the time of the second, unless it were known at the time of the marriage that the woman was in her *iddat* when contracting. If that were known at the time, the second marriage would be invalid, and the child would be affiliated to the first husband, "if that were possible, by its being born at less than two years from the death or repudiation, and at six months or more from the date of the second marriage, because the second marriage being invalid, preference is given to the valid one, if possible."

Where, again, it is impossible to ascribe the paternity to the first husband, while it is possible to ascribe it to the second, by reason of the date of the first being more than two years from that of the death or divorce, and at six months or more from the second marriage, the descent of the child from the second husband is established; because, though the second marriage is invalid,[1] there is an objection to the descent being ascribed to the valid marriage, and it is preferable to ascribe the pregnancy to an invalid marriage than to *zina*.

Shiah Law. Actual consummation.

Under the Shiah Law, marriage without cohabitation does not affiliate the child of the woman to her husband as under the Sunni Law. Even where consummation has taken place, but the woman gives birth, at less than six months from its occurrence, to a perfect and living child, there would be no affiliation. If both the parties concur in declaring that its birth has happened at more than ten months from consummation or, in exceptional cases, eleven months, or this fact can be established by the husband's absence from his wife for a period longer than the longest period of gestation,

[1] It is assumed that the woman was known to be in *iddat* at the time of the marriage, which might be if she believed herself to be pregnant.

the child to which the woman gives birth would not be affiliated to her husband. It is doubtful whether affiliation would take place under such circumstances even if he were to claim the child as his own. But where marriage has been consummated, and a child is born to the woman at six months, or more, after such consummation, it becomes affiliated of right to the husband; even though the woman may have committed adultery with somebody else, and such child cannot be disavowed by the husband, otherwise than by *laân* or imprecation; and if the parties differ as to the fact of consummation or the birth of the child, preference, is given to the words of the husband when confirmed by his oath. When consummation has taken place, and the woman has been delivered at six months or thereafter, it is unlawful for the husband to deny the parentage, on suspicion of the mother's misconduct, or even though he "should know her with certainty to have committed adultery; and if he would deny her offspring to be his child, its parentage as from him cannot be rescinded in any other way than by going through the process of *laân*."

If a man should divorce his wife, who thereupon observes an *iddat* or period of probation, and gives birth to a child within the longest period of pregnancy from the date of the divorce, such child belongs to him, if its mother has not cohabited with another person under a valid or *semblable* contract of marriage.

It is incumbent on a husband to acknowledge the child of his wife when he admits that he has had conjugal intercourse with her, and if he should deny the child, his denial is of no avail to the rescinding of its parentage, unless he goes through the process of *laân*. And the same rule holds good, though the parties should differ as to the period between the birth of the child and the date of their intercourse.

When a man has divorced his wife, who, after observing *iddat* has married again, and the woman gives birth to a child at less than six months from the divorce, the child belongs to the first husband, whereas, if it is born at six months or more, it belongs to the second husband.

As regards the issue of *semblable* unions, the *Sharâya* says: "If a man were to cohabit with a stranger erroneously, supposing her to be his wife, and she should give birth to a child, its parentage would be established in him."

If a man supposing a woman to be unmarried, or a widow, or divorced from her former husband, should enter into a contract of marriage with her, and it should afterwards appear that the former husband was not dead, or had not divorced her, the woman must be restored to her first husband, after observing an *iddat* on account of her connection with the second ; but her child, if she is pregnant, belongs exclusively to the second, subject to the conditions formerly mentioned, whether she acted, in the matter of the supposed death or divorce, on the decree of a Judge, or the information of a single person, or the testimony of witnesses.

The Shiah Law (continued.)

The Shiah Law on the subject of *nasab* is explicit. *Nasab*, according to the jurists of this school, is stablised by a *valid* marriage or by a *semblable* contract of marriage. If a man should enter in good faith into a contract of marriage which turns out to be invalid, or if a man cohabits with a woman, erroneously, but *bona fide*, believing her to be his wife, the offspring of such marriage or such intercourse would be legitimate in the eye of the law.[1] Similarly, would *nasab* be established though the union was *ab initio* null and void. For example, if a man married a woman who was forbidden to him, or with whom marriage was unlawful, either *radically*, that is, from the relationship of blood existing between the parties, or by some incidental circumstance, such as fosterage, matrimonial affinity or any other cause, the issue of such an union would be legitimate, if the marriage was contracted in error, or the parties were not aware of the *hurmat* (illegality).[2] If a man married, *by a pure mistake*, a woman within the prohibited degrees of consanguinity, such marriage would be *radically* illegal, but the issue of the union would *not* be illegitimate. As already mentioned, Abû Hanîfa not only agrees with the Shiah doctors, but even goes beyond them in some respects, whilst Abû Yusuf and Mohammed, whose views have been adopted by the great jurist Abu'l Lais, and are in force among the Indian Hanafîs, hold a contrary opinion. According to them, the children of a *radically* illegal union, *viz.*, an union within the prohibted degrees would be illegitimate, whether the marriage was contracted in ignorance or not.

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[1] *Irshâd-ul-Allâmah ; Sharâya-ul-Islâm*, p. 301.

[2] *Jâmaa-ush-Shittât ; Sharâya-ul-Islâm*, p. 457.

When a woman, whose former husband is alive, enters into a second contract of marriage under the *bona fide* belief that the husband is dead, and the man whom she marries labours under the same impression, a child born of such marriage is legitimate according to the Shiahs.

But if the parties were to marry with the knowledge of the fact that the woman's first husband was alive, the intercourse being *ab initio* adulterous, the child would have no *nasab* with his father, according to both Hanafîs and Shiahs.

This position appears clearly in a case stated in the *Jâmaa-ush-Shittât* where the following question was put to the *Mujtahid:*

Q.—"A woman of the name of Hind became pregnant three years from the time her husband became a *mafkûd-ul-khabar*, and gave birth to a child who was named Umar; and people say that the child was begotten by one Bakr. Shortly after Hind intermarried with Bakr in spite of her husband being still missing. Some years later Hind died. Can Umar claim from Bakr the dower due to his mother?"

A.—"According to the case stated, Umar is not the child of the missing husband; and when it is known that he was begotten by fornication it cannot be affiliated to the adulterer, or claim the inheritance of its mother. As regards the marriage of Hind with Bakr, if both knew of its illegality, and that the husband was missing, the woman was unlawful [to Bakr] and the marriage unlawful; and such marriage cannot be the subject of dower, because for fornication there is no dower; and, therefore, even if Umar would be ascribed to the mother, he would not be entitled to claim the dower.

"If Hind and Bakr, or either of them were not aware of the illegality of their union, then she would be entitled to her *mahr-ul-misl*, and her legal heirs can claim the same. But Umar cannot claim. If Umar, however, was begotten under *shubh* (deception or semblance of right) he would be affiliated to the mother and can claim her dower."[1]

Under the Shiah Law, "a child of fornication" (*walad-uz-zinâ*) owns no *descent* to either of its parents. It is regarded as *nullus filius;* "so neither the man who has unlawfully begotten, nor the

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[1] *Jâmaa-ush-Shittât.*

woman who has unlawfully borne, the child, nor any of their relations can inherit from such child ; nor has the child any title to inherit from them."[1]

Musst. Sahebzadi Begum v. *Mirza Himmat Bahadoor.*

The principles of the Shiah Law of legitimacy were discussed at some length in the case of *Musst. Sahebzadi Begum* v. *Mirza Himmat Bahadur*, which came before the High Court of Calcutta.[2] In this case it appeared that a Hindu Rajah, called Modenarain Singh, had contracted an alliance with a Shiah woman of the name of Burati Begum. There were several children born of this union, all of whom were brought up in the Mahommedan faith and the Shiah communion. Upon the decease of one of the sons, leaving behind him his wife Sahebzadi Begum, and a brother and sister, the question was raised whether the latter were entitled to any interest in the estate of the deceased. It was decided that as, under the Shiah Law, there was no *nasab* between them and the propositus, they had no heritable right in his property.

Walad-ul-malâinah.

Whilst the offspring of illicit intercourse—a *walad-uz-zinâ*—owns no relationship or *nasab* under the Shiah Law to either of its parents, the rule is otherwise with reference to the "child of imprecation," *walad-ul-malâinah*, the child whose affiliation has been "cut off" by the proceeding of *laân*.

"The child of imprecation is cut off from the man, not from the woman ; so that the mother and those related through her retain their right of inheritance reciprocally."[3] But if the father were to make a retractation of the *laân*, the *nasab* or the status of legitimacy will be re-established so far as to restore to the child the right of inheritance to its father, but not *vice versâ*,[4] that is, the father cannot, by a retractation, recover his right of inheritance to any property that may be left by the child.

Sunni doctrines.

Under the Sunni Law there is no difference in the status of a *walad-uz-zinâ* and a *walad-ul-malâinah*—a "child of fornication" and a "child of imprecation." Both have a *nasab* with their mother and persons connected with them through their mother, and consequently they can inherit from her and all relations connected through

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[1] See *ante*, p. 124 ; *Fatâwa Alamgiri*, Vol. II, p. 210.

[2] 12 Weekly Reporter, p. 512 ; 4 Beng. L. R., A. C., 103.

[3] *Irshâd-ul-Allâmah ; Jâmaa-ush-Shittât ; Sharâya*, p. 349.

[4] *Ibid.*

her, just as the latter can inherit from them.[1] For example, if, in the case of *Musst. Sahebzadi Begum* v. *Mirza Himmat Bahadur*, the parties had been Sunnis instead of Shiahs, the brother and sister would undoubtedly have taken a share in the inheritance of their deceased brother.

Presumption of marriage when direct testimony not forthcoming.

When the parties are married, and the marriage is a matter of notoriety and capable of distinct proof, any dispute as to the status of the children resolves itself into a mere question whether the children were *conceived and born* in lawful wedlock or not. But there may be cases in which the marriage is not capable of being easily proved. It may have been contracted in a distant country, or under circumstances which preclude the possibility of securing documentary or oral testimony as to the *factum* of the marriage. In these cases the Mahommedan Law presumes a legal marriage from continued cohabitation and the acknowledged position of the parties as husband and wife, provided there is no insurmountable obstacle to such a presumption, and provided the relationship existing between the parties was not "a mere casual concubinage," but was permanent in its character, justifying the inference that they were lawfully married.[2]

For example, if a woman, married to a man from whom she is not divorced, contracts a union with a second person, and lives with him continuously, such continuous cohabitation in the face of the legal bar to their lawful union, will not give rise to the presumption of a legal marriage; or, if the woman were related to the man within the prohibited degrees, their living together as husband and wife will not lead to the presumption of a lawful marriage.

If, however, there were no such bar to their being lawfully married, and the connection was not in the nature of a casual concubinage, the law would presume from continuous cohabitation that they were lawfully married, and would attach the status of legitimacy to the offspring of the connection. Should continuous relationship give rise to the presumption of a marriage, the child of such marriage can be legitimated only by the father's acknowledgment of it, *express or implied*. It is not necessary that he should

[1] *Kanz-ud-Dakâik; Fatâwa Alamgiri*, Vol. VI, p. 629; Sicé, *Lois Musulman*.

[2] *Baker Hussain Khan* v. *Shurfunnissa Begum*, 8 Moore's Indian Appeals, p. 136. See also *Khajah Hidayut Oollah* v. *Raijan Khanum*, 3 Moore's Indian Appeals, p. 295.

acknowledge the child *expressly*. If it can be inferred from his conduct towards and his treatment of the child, that he acknowledged it to be his, the law will attach the status of legitimacy to it.[1]

This position was laid down with considerable distinctness by the Judicial Committee in the case of *Ashrafooddowlah Ahmad Hossain Khan* v. *Hyder Hossain Khan*.[2] In this case their Lordships said as follows:—

"The presumption of legitimacy from marriage follows the bed; and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. *The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive.*"

Aknowledgment need not be express.

As already stated, the acknowledgment need not be express; it may be inferred from *treatment*, but the treatment of the child by the father must be such as to give rise to the inference that the child was treated as a *legitimate* child.

When the child born of the *ventre* of a woman between whom and the father there has existed continuous relationship, has been acknowledged by the latter as his *legitimate* offspring, such acknowledgment will have the effect of giving to the mother the status of a married wife, entitling her to succeed to the inheritance

[1] See 11 Moore's Indian Appeals, p. 94; 8 Moore's Indian Appeals, p. 136; *Musst. Husnoo* v. *Musst. Wahedunnissa*, Agra Sudder Dew. Ad. Decisions for 1861, p. 380.

[2] 11 Moore's Indian Appeals, p. 94.

of her child's father.[1] This point was decided in the case of *Cureemunissa Begum* v. *Prince Ahmad Halimuzzuman*.[2] In this case two ladies named respectively Mahatala and Imtazunnissa claimed to be the widows of Prince Gholam Mohammed. As there was no proof of Mahatala's marriage the Court held against her. As regards Imtazunnissa the Chief Justice (Sir Richard Garth) said as follows :— *Cureemunissa Begum* v. *Prince Ahmad Halimuzzuman.*

"And we should probably have had some difficulty in the case of Imtazunnissa but for the legal presumption, which we consider arises in her case, which does not arise in the case of Mahatala. There is no direct proof of Imtazunnissa's marriage; there is no evidence of her being treated with any special favour or distinction, except as the mother of Prince Haleem ; and there is no doubt that towards the close of his life, and especially in the *wakfnama*, Imtazunnissa was considered as in the same category as Mahatala. But the fact that she was the mother of Prince Haleem, and that Prince Haleem was from the first acknowledged and treated by Prince Gholam as his lawful son, makes all the difference, we think, to the right of Imtazunnissa.

"We have been referred in the course of the argument to a long current of authorities, upon the subject of the presumption both of marriage and legitimacy, which arises under the Mahommedan Law, either from express acknowledgment or from a course of treatment, which amounts to such acknowledgment. This doctrine of presumption is in the present case of great importance. It appears to us to constitute the most essential distinction between the respective claims of these two ladies, whose rights and status we have to determine.

"In many respects the evidence of actual marriage in the case of Imtazunnissa may not appear more cogent than in the case of Mahatala. They may both have received from Prince Gholam (at any rate towards the close of his life) the same amount of attention and kindness ; the provision which he may have made for them may have been equal ; and they may have been treated both by the Prince himself, and after his death by the family, with an equal share of respect and consideration. But having regard to the law of presumption, the great advantage which the one lady

[1] *Radd-ul-Muhtár*, Vol. II, p. 1035. [2] 10 Cal. L. R , p. 293.

possesses over the other consists in this,—that she has a son, who has been clearly and indubitably acknowledged from first to last by Prince Gholam as his legitimate offspring.

"And, as a matter of legal presumption, full effect could not possibly be given to this acknowledgment of the legitimacy of Prince Haleem, unless his mother were also presumed to have been his father's lawful wife." . . . . . .

After referring to several cases, the learned Chief Justice proceeded as follows :—

"In this latter case[1] it is said : 'When a man has openly, and for a long course of time, lived with a woman as a man lives with his wife, and has habitually and openly treated the children as his children before the world, or when he has publicly and advisedly said, of a boy begotten by himself, 'this is my son,' then the presumption takes its fullest effect. In that case, we think that the law not only raises a presumption of marriage, but in practice prohibits any counterproof short of establishing a legal impossibility. In such a case, we may not really believe that there was an actual celebration of marriage ; we may have little doubt that there was nothing of the kind ; but still marriage is legally possible, and it must be presumed, not as much by presumption of fact, as by presumption of law.'

"This appears to meet the case of Imtazunnissa. She undoubtedly cohabited for years with Prince Gholam as his wife ; and she had a child by him, who has been openly acknowledged and treated by the Prince as his lawful son. We may not find in her case any evidence of the actual fact of marriage more cogent than in the case of Mahatala, and yet we would be justified under the circumstances in presuming almost conclusively her marriage with the Prince."

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[1] *Musstt. Nawabunnissa* v. *Musstt. Fuzloonnissa*, Marshall's Rep., p. 428. See also *Rook Begum* v. *Walagawkur Shah*, 3 W. R., p. 187.

CHAPTER III.

ADOPTION, FILIATION, AND THE DOCTRINE OF ACKNOWLEDGMENT.

ADOPTION in the sense in which it is understood by the Hindus, and as it was practised among the Romans, is not recognised by the Mahommedan Law. Among the Romans, as among the Hindus of the present day, it was intimately connected with religious ideas, "having relation to the repose of the souls of the departed and the preservation of the household divinities." It existed also among the pre-Islâmic Arabs, and, no doubt, had a similar origin.[1]

The odious name attached by the pagan Arabs to any person leaving no male issue behind him[2] is sufficient evidence of the importance which the custom of adoption possessed in their eyes.

The Prophet appears to have recognised the custom at the time he adopted Zaid, the son of Hâris. Later, when he had weaned the idolatrous tribes from the revolting practices to which they were addicted, and had given them loftier ideas of domestic relationship, he explained in fuller terms, that adoption similar to what was practised in the "Days of Ignorance" created no such tie between the *adopted* and the *adopting* as resulted from blood relationship.[3]

The Mussulman Law, accordingly, does not recognise the validity of any mode of *filiation* where the parentage of the person adopted is *known* to belong to a person other than the adopting father.

Ikrâr or acknowledgment.

The only form of filiation which is recognised by the Mahommedan Law is the one which is created by *ikrâr* or "acknowledgment." The father alone has the right to establish the relationship, to the total exclusion of the mother and other relations.

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[1] Caussin de Perceval, *Histoire des Arbes*, Vol. I, p. 364.

[2] *El-abtar*, *lit.* tailless.

[3] Koran, chap. xxxiii; Tabari (Zotenberg's Translation), Vol. III, p. 58.

Such acknowledgment may be either *express* or *implied*; it may be made in express terms, or may be implied from the father's conduct towards, and his continued treatment of the child as his own child.[1] But in order to render the acknowledgment valid and effectual in law, three conditions must be fulfilled, *viz.* :—

(1) The acknowledgor and the acknowledged must be of such ages respectively as would admit of the possibility of their standing in the relation of parent and child to each other. For example, a man "cannot establish the relationship of father and son between himself and another unless he is at least twelve and a half years older than the son he intends to adopt or acknowledge."

(2) The person acknowledged must be of *unknown* descent (*Majhûl-un-nasab*,).[2] If the parentage is known, no *ascription* can take place to the acknowledgor.

(3) The acknowledged must believe himself *to be the acknowledgor's child*, or, at all events, assent to the fact.[3]

The *Hedâya*, with reference to this latter condition, says: "It is also a condition that the boy verify the acknowledgment, because he is considered to be his own master, as he is supposed to be able to give an account of himself. *It would be otherwise if the child could not explain his condition.*"[4]

An infant who is too young to understand what the relationship implies, or to give an account of himself, is not required to agree to the acknowledgment, nor is his assent a condition precedent to the validity of an acknowledgment, as it is in the case of an adult.

The *Jouharat-un-Nayyirèh* says: "The assent is required only from a young person who is possessed of discretion and is able to give an account of himself . . . . it is not necessary in the case of an infant."

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[1] *Fatâwa Alamgiri*, Vol. I, p. 703; *Sharh Vikâyah*, Vol. II, p. 438; *Hedâya*, Bk. xxv, chap. iii.; *Sharâya-ul-Islâm*, p. 376; 3 Moore's Indian Appeals, p. 245; 5 Weekly Reporter, p. 132.

[2] *i.e.* of unknown paternity, at the place of his birth or at the place where he is residing.—*Durr-ul-Mukhtâr*, p. 604.

[3] There is no difference between the Shiahs and the Sunnis on this point.—*Sharâya-ul-Islâm*, p. 376.

[4] *Hedâya*, Bk. xxv, chap. iii, Vol. III, pp. 168, 169. The rule applies to both and male female children. See *Omda Bibee* v. *Jonab Ali*, 5 W. R., p. 132; *Fazeelun Bibee* v *Omda Bibee*, 10 W. R., p. 469; *Waheedun* v. *Wasee Hossein*, 5 W. R., p. 402.

The *Jâmaa-ush-Shittât* says: "No regard is paid to the assent of a young child," and the *Sharâya-ul-Islâm* adds: "If an infant is acknowledged and afterwards, on attaining his majority, he denies the paternity, such denial is of no effect."

"All that has been said is subject to this qualification, that the acknowledgor is not suing for property. When property is sued for on the ground of the relationship, as, for instance, when a woman sues a man on the ground of his having married her for such a dower and then repudiated her before consummation, and thereupon claims half her dower; or a woman sues a man for maintenance, declaring herself to be his wife, the Judge (it is generally agreed) is to put her on her oath." In other words, the mere acknowledgment which is involved in the claim is not sufficient to establish the relationship. Subject to limitations.

An acknowledgment of paternity produces all the legal effects of natural paternity; and it vests in the child the right of inheriting from the acknowledgor.

An acknowledgment of parentage may be considered, therefore, as analogous, in certain of its legal effects under the Mahommedan Law, to the doctrine of *legitimatio per subsequens matrimonium*. But there is this marked difference between the two doctrines, that whereas *acknowledgment* presumes a *prior marriage*, the legitimation of antenuptial children by a subsequent marriage proceeds upon a totally different hypothesis. As far, however, as the status of legitimacy is concerned, both doctrines lead to the same result—of legitimating the issue of an invalid connection, or of a marriage of which there is no proof that it was validly contracted.

In the case of *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*,[1] Edge, C. J., and Straight, J., laid down, somewhat broadly, that the rules of the Mahommedan Law relating to acknowledgment by a Mahommedan of another as his son are rules of the substantive Law of Inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of a legitimate birth or of illegitimate birth, and the paternity of a child is unknown, in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*.

[1] I. L., 10 All., p. 289.

claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledgor, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledgor or of any one claiming through him. The enunciations of Mahmood, J., were more exact. The learned Judge held, that although, according to the Mahommedan Law, *ikrâr* or acknowledgment in general stands upon much the same footing as an admission as defined in the Evidence Act, acknowledgments of parentage and other matters of personal status stand upon a higher footing than matters of evidence, and form a part of the substantive Mahommedan Law. So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognised by the Mahommedan Law as a means whereby the marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledgor, and there is nothing in the Mahommedan Law similar to adoption as recognised by the Roman and Hindu systems, admitting of an affiliation which has no reference to consanguinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimised by an acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth, is a matter of uncertainty.

Acknowledgment of a child by a married woman.

The acknowledgment of a child by a *married* woman is *not valid*, inasmuch as it affects another person, *viz.*, the husband, unless it is confirmed by the husband's own declaration. For example, if Hind, the wife of Zaid, were to say that Amr, a person of unknown parentage, was her son, her statement would have no legal effect, for, were it otherwise, liability might be attached to the husband, prejudicially perhaps, through his wife's statement. If, however, he were to confirm her acknowledgment, it would be valid, and the son Amr would acquire the status of legitimacy.

This rule is intended to guard against the imposition of fictitious children as the offspring of a particular person; and with this object it is also laid down that maternity can be established by the testimony of the midwife, when it is necessary to ascertain that the child with reference to whom a claim is advanced, "is the identical child which the said woman brought forth."[1]

It will be seen, therefore, that a woman who is married, or one who is observing the *iddat* or probation, during which she cannot contract a second marriage, is precluded from acknowledging or adopting a child, unless her acknowledgment is confirmed by her husband, or the child is proved to be her own.

"A woman's acknowledgment," says the *Inâya* "with respect to a child, is not valid, inasmuch as the parentage affects another, namely, the husband, unless her statement is confirmed by him (as the right appertains to him), or the birth be proved by the testimony of a competent woman, namely, the midwife;" or, it may be added, any other evidence that may be procurable to connect the child with the mother.

If she is married, and her husband confirms her in what she has said about the child being hers, its descent is established from both, and there is no necessity for any proof; but if he deny what she has said, she is not to be believed without proof, because she is burdening another with the descent. The testimony of the midwife, however, is sufficient for this purpose, because all that is required is to identify the child as hers, the ascription to the husband being an inference from the existing *firâsh* or bed.

If she is undergoing her *iddat*, full proof is required, according to Abû Hanîfa, unless the pregnancy was manifest, or the husband had previously ackowledged it, though, in this case also, the two Disciples were of opinion that the testimony of one woman would be sufficient. If she be neither married nor a *muattadah* the descent of the child would be established by her word, because it is obligatory on none but herself, *according to the approved opinion*, though some jurists maintain that, whether married or not her assertion is not to be received without proof.[2]

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[1] *Hedâya*, Bk. xxiv, chap. v.

[2] *Inâya*, p. 215. Maternity admits of positive proof; because the separation of a child from its mother can be seen; (*Inâya*, Vol. III., p. 588). The testimony of one woman is sufficient to establish that fact. Descent from her

But supposing the husband be dead, the mother's declaration as to the legitimacy of a posthumous child born during the *iddat*, or longest period of gestation recognised by law, is of effect only if unopposed by other heirs to the property.

If the actual birth of the child be not in dispute, if there be no question as to its legitimacy, if the mother's statement that the child born to her is her deceased husband's be assented to, expressly or impliedly, by his heirs, "the child should be held to be descended from the husband "....." though no person bears evidence to the birth." [1]

Such child would succeed, of course, to its deceased father. But a question may arise whether the parentage so established would affect the rights of others than those heirs who acknowledged him to be the child of the deceased. Would their acknowledgment, in fact, establish conclusively the legitimacy of the child and impart to its status the character of a right *in rem*? The opinion on this point seems to be, that, if there be no doubt as to the credibility of the acknowledging heirs, if their ackowledgment cannot be impeached in any way, then "the parentage which is established affects others as well as themselves,[2] and is conclusive against all the world." [3]

Shiah Law. Acknowledgment by a woman.

Under the Shiah Law also, a married woman can create the relationship of mother and child between herself and another person, if all the requisite conditions are complied with, and her declaration is confirmed by her husband. The Shiah Law coincides with the Sunni doctrines regarding the conditions necessary to constitute a valid acknowledgment of a child. It requires also

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is therefore established by birth (*Jouharat-un-Nayyirèh*, Bk. of Ikrâr). All that is required is identification of the child; and the Prophet himself accepted the testimony of the midwife to the birth of a child (*Hedâya*, Vol. III. p. 519).

[1] *Radd-ul-Muhtâr in loco.*

[2] *Hedâya* (Eng. Transl.), p. 381.

[3] Abû Hanîfa says that if a woman, separated from her husband, be delivered of a child during the period of probation, "the parentage is not established in the husband, "unless the birth be proved by the evidence of two male witnesses, or one male and two female witnesses." The author of the *Hedâya*, however, explains this by saying that this rule applies to a case "where there is no apparent pregnancy." As a matter of fact, however, it would appear to be settled now that the evidence of the midwife is sufficient in law to establish the actual birth. Comp. Abû Hanîfa's views with the Shiah doctrines.

that, in the first place, the child acknowledged must be of unknown descent or parentage. If it should be generally known that the *acknowledgor* and the *acknowledged* were not related to each other by the tie which they allege, or if it should be known that the parties belong to different families, or that the child has a *known* father or mother other than the *acknowledgor*, the acknowledgment is not valid.

In the second place, there should be such a difference of years between the parties as to render it possible that they could stand towards each other in the acknowledged relationship. No particular limit of age is specified in the Shiah Law, the law of nature furnishing the guiding principle in such cases. Nor is the acknowledgment of a child by a man valid when he could not possibly have had access to its mother during the age of such child.[1]

In the third place, there should be no dispute as to the parentage of the child, that is, no other person should claim the child to be his own; in which case, the acknowledgment is not valid without proof.[2]

An acknowledgment, therefore, of a child by a married woman is valid in law, provided her husband confirms her statement, and the requisite conditions, as stated above, are complied with.

But where the husband is dead, and the widow is delivered of a child, the question seems to be involved in great doubt. If there be no dispute as to the birth of the child, the parentage would, of course, be ascribed to the husband; but when the child's legitimacy is questioned, difficulties arise which cannot be easily solved by a literal interpretation of the Shiah doctrines. Recourse must then be had to equity and to a liberal construction of the letter of the law as adopted by the more modern jurists of the Shiah school in Persia.[3]

Acknowledgment by the heirs of a deceased.

For example, the Shiah Law declares that descent or *nasab* cannot be established except by the testimony of two *just* men;[4] "nor can it be established by the testimony of two profligates, even though they be heirs,"[5] except in so far as the "profligates" themselves are concerned. The *raison d'être* of this restriction is

[1] *Sharâya*, p. 376; *Irshâd-ul-Allâmah*; see 4 Beng. L. R., A. C. 55.

[2] *Jâmaa-ush-Shittât.*

[3] Compare most of the dicta in the *Jâmaa-ush-Shittât.*

[4] *Aadil, i.e.*, a man leading an honest life, never accused nor convicted of any serious civil or moral offence.

[5] *Sharâya*, p. 377.

perfectly clear. It is laid down with the object of preventing the perpetration of fraud by the collusion of unscrupulous heirs. This is shown in the following rule: "If two brothers, being *just* persons, should testify to another being a son of their deceased brother, his *nasab* or descent, and his right to the inheritance of the deceased, would be established; but such right would create no reciprocity."[1] The son so acknowledged would inherit *from the deceased*, but neither would he inherit from the deceased's brothers, nor would they from him. Even if two "profligate"[2] brothers acknowledged a certain child to be their deceased brother's offspring, such child would succeed to his inheritance in preference to them.

It will be seen, therefore, that where the legitimacy of a posthumous child is questioned, the Shiah Law acquires more ample guarantees than the Hanafî Law against fraud and collusion. As long as this is kept in view, and the conception and birth of the child is satisfactorily proved, the technicalities of the Shiah Law may safely be disregarded.

Under the Shiah Law, if a deceased person leave a widow and brothers, and the widow acknowledge a child to be the child of her deceased husband, her share in the estate of the husband is reduced from one-fourth to one-eight; the *acknowledged* child takes the other eighth, even when the descent is disputed by the deceased's brothers. When the descent is established in a Court of Justice or assented to by the brothers, the child takes the entire residue.

An unmarried woman, or a woman who has no husband, can create the relationship of mother and child between herself and another person by a simple *Ikrâr* or acknowledgment, provided the other conditions are fulfilled.

Acknowledgment of other relationship.

As already stated, acknowledgment also establishes certain other relationships besides parentage; and in these cases there is no distinction between an acknowledgment made by a man and that made by a woman. For example, a person may acknowledge another as his or her father or mother, or husband or wife; and such acknowledgment, if *assented* to or confirmed by the acknowledged, whether during the lifetime of the acknowledgor or after his or her decease, would constitute a valid relationship.[3]

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[1] Men whose evidence is impeachable. [2] *Hedâya*, Bk. xxv, chap. iii.
[3] *Ibid.*

"The acknowledgment of a man," says the *Fatâwa Alamgiri* "is valid with regard to five persons—his father, mother, child, wife and *mawla*; because in all these cases he acknowledges an obligation [of maintenance], but it is not valid except for these. The acknowledgment of a woman is valid with regard to four persons—her father, mother, husband and *mawla*. But it is not valid with regard to a child, unless assented to by her husband, for it is burdening him with paternity."

Acknowledgment of relationship other than filial.

In the case of these acknowledgments, *express* assent on the part of the acknowledged is necessary to constitute a valid relationship; when there is no such assent proved, the acknowledgment falls to the ground and creates no right on either side.

In these cases, also, the parties must be of unknown descent in order to stand to each other in the alleged relationship without disregard to obvious facts.[1]

Shiah principle.

"The descent of any other than a child cannot be established," says the *Sharâya*, "without the assent or concurrence of the person acknowledged";[2] and the right of inheritance created by such an acknowledgment is restricted to the acknowledging parties themselves and does not extend to their heirs. It is otherwise in the case of parent and child. If one person acknowledges himself the father of another, who, if able to do so, "verifies and avows the filial tie, these are not only by law the heirs of each other, but this right extends to all the heirs or descendants of both." But if "a person declare another to be his brother, who, on his part, avows the relationship, and they are not known to be the contrary, the right of inheritance is established between them as to each other, but does not extend to the brothers of either nor to any other relation."[3]

If the acknowledgor has any *known* heir his acknowledgment of *nasab* in favour of another does not exclude the former from his natural right of inheritance, or vest any right in the acknowledged. The *Sharâya* lays down as a general rule that, in such a case, "his acknowledgment of *nasab* is not to be accepted."

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[1] *Sharâya*, p. 460; *Jâmaa-ush-Shittât*.

[2] *Sharâya*, p. 376.

[3] See *Himmat Bahadoor* v. *Sahebzadi Begum*, 15 B. L. R., p. 182; L. R. 2 I. A., 23. Same under the Hanafî Law, *Hedâya*, Vol. III, p. 169; collateral adoption is also allowed under the Mâlikî Law, 1 Sautayra, p. 339.

Acknowledgment of a wife.

The acknowledgment by a man of a woman as his wife is valid when confirmed by her, and she is not married to another husband nor is in her *iddat*, and the acknowledgor is not under a legal incapacity to marry her.

Acknowledgment is valid with respect to all these persons whether it is made "in health or in sickness,"—in other words, whether it is made *inter vivos* or *in extremis*, because it is of a matter binding on the acknowledgor himself, and the burden of the descent is not cast on any other.[1] The acknowledgment of a man with respect to persons other than those before-mentioned, such as a brother, or a paternal or maternal uncle, or the like, affects only the acknowledgor and acknowledged. But in the case of a child it is obligatory not only on the acknowledgor and the person acknowledged, but on other persons also.

Acknowledgment of son—its effects.

So that if, for instance, one were to acknowledge a son, the person acknowledged would inherit together with all the other heirs of the acknowledgor, though they should all deny his descent, and he would inherit also from the father of the acknowledgor, that is, the grandfather of the person acknowledged, though the grandfather should deny his descent. As regards any other relationship the acknowledgment only binds the persons concerned. And, accordingly, in the *Fatâwa Kâzi Khân* the matter is explained thus :—

Of other relations.

"And when it has been said that the acknowledgment of a man is not valid with respect to those above-mentioned, it is only meant that it is not obligatory on any other except the acknowledgor and the acknowledged ; but with regard to such rights as affect them only, the acknowledgment is valid."

So that, for instance, if a person were to acknowledge another as his brother, having other heirs beside, who deny the alleged relationship, and the acknowledgor should die, the person so acknowledged would not inherit with the other heirs, nor would he inherit from the acknowledgor's father if he should deny the descent, but [if decrepit] he would be entitled to maintenance as against the acknowledgor himself during his life.

Where no other heir.

If the acknowledgor left no heir, the person acknowledged would be entitled to his succession, because the acknowledgment

[1] *Indya*, Vol. I., p 616; *Jouharat-un-Nayyirèh*, Bk. of Ikrâr

comprehends two things,—descent and a right to the acknowledgor's property after his death, and though the first cannot be entertained as it affects another party, the second is not open to the same objections, because it is only against himself, and a man has the power of disposing of the whole of his property when he has no creditor nor heir.[1]

If a person whose father is dead should acknowledge another as his brother, though the descent would not be established by reason of his statement, yet the person acknowledged would be entitled to share with him the father's inheritance.

Woman's acknowledgment of a husband.

If a woman were to acknowledge, either in health or in illness, that she married a particular individual for so much dower, and were then to deny the marriage, and the husband were to assent to it during her life, the marriage would be established; but if he should not assent till after her death, it would not be established, according to Abû Hanîfa, nor would the man be entitled to any share in the inheritance; though, according to Abû Yusuf and Mohammed, it would be established. And this is still further explained by what follows.

"In a case of parentage, confirmation by the person acknowledged is valid after the death of the acknowledgor, because the relation continues after death. So also, assent or confirmation by a wife is valid after the death of the acknowledging husband, because the effect of the marriage continues after death till the expiration of the *iddat*. In like manner, assent or confirmation by a husband is valid after the death of his wife, according to Abû Yusuf and Mohammed, because of his right of inheritance, which is one of the effects of marriage; but, according to Abû Hanîfa, it is not valid, because the marriage itself is cut off by the death, and the assent cannot be founded on the right of inheritance, which was not in existence at the time of acknowledgment, to which the assent must necessarily be referred."[2] The *Fatwa* is with Abû Hanîfa.

The effect of contradictory statements as to legitimacy.

Descent, according to Abû Hanîfa, is one of those things which cannot be dissolved after it has once been established; and, consequently, when once a child has been acknowledged, its status cannot be reversed by a subsequent rejection, but will continue

[1] *Inâya*, Vol. III, p. 616.

[2] *Hedâya* and *Kifâya*, Vol. III., p. 582; *Jouharat-un-Nayyirèh*, Bk. on Ikrâr.

as a bar to any other claim. Similarly, if a person were to testify that a particular child was the child of a particular man, and should afterwards, on his testimony being rejected, claim the child as his own, such claim will not be accepted. Or, if one were to say with respect to a child in his custody, "He is the son of my absent slave so-and-so," and should afterwards say, "He is my own son," there would be no *nasab* between the boy and the man—not even, according to Abû Hanîfa, though the slave should deny the boy to be his son.

If a man were to acknowledge that he married a particular woman for a certain dower, and after making such admission were to deny the marriage, supposing such acknowledgment is assented to by the woman her during his life or after his death, such acknowledgment would be lawful, and she would entitled to her share in the inheritance, and also to the dower, with this difference, that if the acknowledgment were made by the man in *extremis* and the dower admitted by him exceeded her proper dower, the acknowledgment would be of no avail as to the excess.

Capacity to acknowledge.

An acknowledgment can take place only when the person acknowledging possesses the legal capacity of entering into a valid contract. The person must be adult, sane, and free. An acknowledgment made by an infant (under the Mahommedan Law, one who has not attained the age of puberty), or by a person who is in *duress*, or who is *non compos mentis*, is absolutely invalid. An insane person, however, may be *acknowledged* without regard to his or her assent, in the same way as an infant.[1]

Regard must always be paid to the fact that when an acknowledgment is in favour of a child or an insane person who cannot assent to the relationship so created, the interest of such child or such person should not in any way be affected.

Shiah Law.

Under the Shiah Law, if a child of unknown paternity (*nasab*) were to die without leaving any heir except the Imâm, and some person were to make a *declaration* to the effect that the deceased was his child, the inheritance of such child would go to the declarant, instead of the Imâm. Foundlings (*lakît*) are recommended to the especial care of all Mussulmans. The person who

[1] *Sharâya*, p. 376.

takes charge of such children occupies the position of a father towards them, and is entitled to inherit from them.[1]

If a man were to cohabit with a woman (not by way of a casual relationship), and to have issue by her and were to acknowledge such children as his *legitimate* offspring, such acknowledgment would supply any defect in the evidence of marriage. The acknowledgment of legitimacy proceeds upon the basis of a prior lawful relationship between the parents. But if the marriage is alleged and disproved, the effect of an *implied* acknowledgment as deducible from mere treatment is minimised, though in one or two cases recently decided by their Lordships of the Privy Council, the principle has been stretched so far as to create some confusion in the Law Courts in this country. In the case of *Ladli Begum* v. *Azmat Ali Khan*,[2] their Lordship said as follows :—

Ladli Begum v. Azmat Ali Khan.

"The questions which arise are, first: whether there was a marriage between the late Nawab and Mussamut Ladli before the birth of the plaintiffs, in which case, of course, both would be his legitimate sons; and, secondly, whether, if that be not established, there is proof of an acknowledgment and recognition by the Nawab of the two plaintiffs as his sons, which would give them the status of sons and a title to inherit.

"The direct evidence of the marriage is not very satisfactory, and is in some respects contradictory. Still there is positive evidence that a ceremony of marriage did take place before the births of the children. That direct evidence is met by the negative evidence of witnesses, who say, that if such a ceremony had taken place they must have known of it.

"From this state of the evidence, if it stood alone, it would be difficult to affirm that a marriage had been established, but the evidence exists, and a question certainly arises, whether the treatment of the minor-plaintiffs by the Nawab as his sons, to be hereafter adverted to, and the acknowledgment he made respecting them, do not afford such a strong presumption of marriage as to entitle the testimony of the witnesses who speak to the marriage, to credit which otherwise it would not have possessed.

"Their Lordships, however, do not think it necessary to decide the case upon the ground that an actual marriage is proved. The

[1] For fuller information on the subject, see D'Ohsson's *Tableau General de l'Empire Ottoman*, Vol. III.

[2] I. L., 8 Cal., p. 422.

Commissioner of Lahore has found against the marriage. The two Judges of the High Court certainly do not find against it. The inclination of Mr. Justice Lindsay's opinion was the other way; they therefore did not find against the marriage, though they have not affirmed it. Their Lordships also do not find it necessary to pronounce a distinct opinion upon the question, whether the marriage, in fact, took place, as they think the plaintiffs are entitled to succeed upon the ground that acknowledgments of them as his sons by the Nawab have been proved."

Then, after discussing the evidence, their Lordships proceeded to state the law thus :—

"The only question which remains on this part of the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of Mahommedan Law has not been disputed at the Bar, *viz.*, that the acknowledgment and recognition of children by a Mahommedan as his sons gives them the status of sons, capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case.

"That rule of the Mahommedan Law has not been questioned at the Bar. In this case we have not only the treatment of the plaintiffs by the Nawab as his sons, from which, under certain circumstances, an acknowledgment may be presumed; but we have actual acknowledgment of them. It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahommedan as his sons may be inferred from his having openly treated them as such.

"The question whether the acknowledgment should be presumed or not must, of course, depend on the circumstances of each particular case as it arises.

"The only authority, after the course which the argument has taken, to which their Lordships think it necessary to refer, is the case of *Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan*.[1] In that case their Lordships say :—'The presumption of legitimacy from marriage follows the bed, and whilst the marriage

[1] 11 Moore's Indian Appeals, p. 94.

lasts, the child of the woman is taken to be the husband's child, but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate.'"

Clearly their Lordships never intended to imply that an acknowledgment by a man of his natural-born children,—of his offspring by a woman between whom and himself there could not be any valid union, or notoriously there was none,—would give the children the status of legitimacy, though the Courts in this country have to some extent understood the decision in that sense. An acknowledgment to be effective must directly or indirectly point to the children as his *legitimate* issue.[1]

In another case,[2] the Judicial Committee held as follows:—

"The real issue in this case, and the only issue upon which their Lordships feel it necessary to decide, is whether Selim, who was beyond question the actual son of Amir Hossein by a woman known as Domni, had been so recognised by Amir Hossein as to give him the status of a son capable of inheriting.

"The suit relates to the property of Amir Hossein. He died in the year 1866; and if Selim is in the position of having the right of a son in reference to heirship, the plaintiff in the case, who claims as the assignee of his interest, is entitled to succeed. A question of importance was raised by the counsel for the appellant. He contended that Selim could not be treated as having acquired the status of a son capable of inheriting, because he alleged that the intercourse between Amir Hossein and Domni was an adulterous intercourse, as she had been previously married to a person then and still living, and that, consequently, whether her connection with Amir Hossein was preceded by a marriage ceremony with him or not, yet still the intercourse was adulterous, and that, according to Mahommedan Law, the issue of that adulterous intercourse could not inherit as heir or acquire the status of a son by recognition.

"It, therefore, becomes necessary to consider in the first instance whether the alleged marriage of Domni to a man named Jummun has been established by satisfactory proof." Jummun appears to have been a person of somewhat the same degree in life as Domni,

[1] The law is clear on the point that the offspring of an adulterous intercourse cannot be legitimated.

[2] *Sadakat Hossain* v. *Mahomed Yusuf*, I. L., 10 Cal., p. 663.

whose father's name was also Jummun. This marriage, if it took place at all, would have occurred shortly before or somewhat about the same period as the alleged marriage between Amir Hossein and Domni. The alleged marriage of Jummun with Domni is said to have been somewhere about 1852 or 1853, and the alleged marriage of Domni with Amir Hossein must have taken place about the same period.

"Amir Hossein died in 1866, leaving Selim, his son, then about eight or nine years of age, which would have made him born in 1857 or 1858. Another child had been born of the intercourse between Amir Hossein and Domni about four years before; so that the marriage between Amir Hossein and Domni, if it ever took place, is referred to about the same period as the alleged marriage between Jummun and Domni. Now the account given of Jummun is certainly one of an incredible character.

"The statement is that he became acquainted with Domni when he went to live in this particular village."

Their Lordships then examined the evidence as to the alleged marriage between Jummun and Domni, and concluded as follows:—

"Their Lordships have then come to a conclusion that the parties fail to establish this marriage between Jummun and Domni. That relieves them from offering any opinion upon the very important question of law which was raised by the counsel for the appellant; namely, whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by an acknowledgment.

"The absence of reliable proof, such as their Lordships could act upon, of the marriage of Domni and Jummun, appears to their Lordships to relieve the case from further difficulty. They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Mahommed Azmat Ali Khan* v. *Mussummat Ladli Begum*,[1] which is as follows:—'Their Lordships are relieved from a discussion of those authorities, inasmuch as the rule of Mahommedan Law has not been disputed at the Bar, *viz.*, that the acknowledgment and recognition of children by a Mahommedan as his sons gives them the status of sons capable of

[1] See *ante*, p. 227.

inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case.'

"Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it. The Judge of the primary Court who saw and who heard the witnesses, and the Judges of the Supreme Court who examined the evidence afterwards, concur in opinion that there was sufficient evidence of the acknowledgment by Amir Hossein of Selim as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the status of a son capable of inheriting.

"Upon that point both the Courts come to one conclusion ; and that conclusion their Lordships adopt. They think that the status of Selim as son has been sufficiently established by recognition so as to enable him to claim as heir."

CHAPTER IV.

THE PATRIA POTESTAS.—THE *WILAYET-UL-IJBAR.*

AMONG the ancient Arabs and the Hebraic tribes settled in Arabia, the power of the father seems to have been as absolute over his children and all members of the family of which he was the recognised head as it was among the Romans.

This unfettered exercise of the *patria potestas*, which recognised no limit or check to the caprices of irresponsible family chiefs, was restrained within reasonable bounds by the legislation of the Arabian Prophet.

A Mussulman father has, subject to certain well-defined conditions, the power of *imposing* the status of marriage on his children; of compelling them up to a certain age to live in the paternal house, and of partially correcting them when necessary.

Most of the provisions relating to the *patria potestas* are not peculiar to the Mahommedan Law. The distinguishing feature of Islâmic Jurisprudence, as compared with modern systems of law, consists in the power of the father to *impose* the status of marriage on his *minor* children. It is known as the right of *jabr* and is recognised with various modifications by all the schools.

The right of *jabr* among the ancient Arabs.

The right of *jabr* is founded on the original *patria potestas* which existed among the Arab tribes from the earliest times. Among them the father had the right of compelling his sons to marry until such time as they were capable of bearing arms, and the daughters until their *emancipation*, by marriage or otherwise, from his control.[1]

Among the Jews.

Among the Jews, the father could give his daughter in marriage without her consent as long as she was a minor, that is, had not attained the age of twelve.[2]

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[1] Perron, *Femmes Arabes*, pp. 191-226.

[2] *Code Rabbinique*, Ebn Haezer, Vol. I, p 123.

Under the Mahommedan Law, according to all the schools, the power of the father to give his children in marriage without their consent can be exercised in the case of sons until they have attained their *bulâghyèt* or puberty, when they are emancipated as far as their personal rights are concerned, from the *patria potestas*, and are at liberty to contract themselves in marriage. As regards female children, there is considerable divergence among the several schools. Under the Mahommedan Law.

Persons not *sui juris* labour under the same legal disabilities as in other systems of law. They cannot enter into any contract or legal transactions without the consent of their natural guardians.[1]

The want of capacity, which results from minority, is founded on the principles of right reasoning and the desire to protect people not competent to exercise sound discretion in the affairs of everyday life, from the consequences of their own acts.

An infant, accordingly, is incompetent to enter into a contract of marriage without the consent of his or her guardian. A marriage contracted by a minor, who is possessed of understanding (*rushd*) is not, however, absolutely invalid, but its validity, like that of any other act committed, or contract entered into by an infant, is dependent on its ratification by the guardian, or by the person who stands in *loco parentis*.[2]

The power, which the Mussulman Law vests in the father, of imposing the status of marriage on his minor children is, in principle, absolute and unlimited. But this power is surrounded with so many conditions and formalities, that the mischief, which otherwise might arise from it, rarely occurs in practice. The right of *jabr*, in its harsher form, terminates practically with puberty.

Puberty is presumed on the completion of the fifteenth year, according to most of the schools,[3] unless there is evidence to the contrary. As a general rule, however, a person who completes the fifteenth year is considered, without distinction of sex, to be adult and *sui juris*, possessed of the capacity to enter into legal transactions (تصرفات الشرعيه, *tassurruffâtush-shiarâyèh*). Ends with puberty.

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[1] *Fatâwa Alamgiri*, Vol. I, p. 377; *Kanz-ud-Dakâik*; *Jâmaa-ush-Shittât*.

[2] *Hedâya*, Vol. III, pp. 482-483; *Jâmaa-ush-Shittât*.

[3] The presumption *may* be rebutted.

After the age of fifteen every contract of marriage entered into on their behalf is dependant upon their *express* consent; and, among the Hanafîs and Shiahs, the children of both sexes are free to contract marriages without the consent of their guardians.[1]

There is no divergence between the several schools as regards the capacity of a son to contract himself, after he has completed his fifteenth year, though there exists considerable difference of opinion as regards the capacity of female children.[2]

The Hanafîs and the Shiahs hold that the right of *jabr* in the case of males, as in that of females continues until they have arrived at the age of puberty.[3]

"It is not lawful for a guardian," says the *Hedâya*, "to force an adult virgin into marriage. None, not even a father nor the sovereign, can lawfully contract a woman in marriage who is adult and of sound mind without her permission, whether she be a virgin or not."[4]

Similarly, the Shiah Law declares that neither a father nor a grandfather has authority over an adult and discreet virgin, who is herself competent to enter into a marriage contract. This rule applies also to a woman who is not a virgin.[5]

Mâlikî and Shâfeï Law.

The followers of Mâlik and Shâfeï, on the other hand, are of opinion that the exceptional right of *jabr*, in the case of females, continues in force until they are married, and, consequently, emancipated from the paternal control.[6]

These schools, also hold, that the right of *jabr* does not cease when the girl is a *safîha* (devoid of intelligence), or when she has been married whilst yet a minor, and has been divorced before arriving at maturity.[7]

Though the right of *jabr* is theoretically an absolute right, in practice there are numerous conditions attached to its exercise. The father, without any difference among the jurists, is prohibitod

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[1] *Radd-ul-Muhtâr; Jâmaa-ush-Shittât; Irshâd-ul-Allâmah; Al-Muharrar* (Shâfeï).

[2] *Al Wâfi; Ikhtilâf-ul-Aimmah* (India Office copies).

[3] *Hedâya* Vol. I, p. 96; *Fatâwa-Alamgiri*, Vol. I, p. 399; *Kanz-ud-Dakâik; Sharâya*, p. 263; *Jâmaa-ush-Shittât.*

[4] See also the *Fatâwa Alamgiri*, Vol. I, p. 406.

[5] *Sharâya*, p. 263.

[6] *Kitâb-ul-Anwâr l'aamâl-ul-abrâr*, Book on *Nikâh* (Marriage).

[7] *Ibid: Al-Muharrar.*

from marrying his child to those who are diseased, to slaves, idiots, and other ineligible persons. But Abû Hanîfa and his two Disciples seem to differ on the question, how far a marriage contracted by a father on behalf of a girl for an inadequate dower (*mahr*) is valid in law. Abû Hanîfa appears to think that inadequacy of consideration is no ground for holding the marriage to be invalid. Abû Yusuf and Mohammed, however, are of opinion, that when the dower is out of proportion to the fortune of the husband, the contract is not valid. And there seems to be a general consensus of opinion among all the jurists that where the father has acted "wickedly or carelessly," the marriage is voidable.[1]

If a man should agree on behalf of his minor son to pay a dower far beyond the means of the infant, and there is reason to believe that he acted *mala fide*, the marriage would similarly be voidable.

In fact, the law is particularly attentive to the interests of the child. It takes care that the right of *jabr* should never be exercised to the prejudice of the infant; any act of the father which is likely to injure the interests of the minor is considered illegal, and entitles the Kâzi or Judge to interfere in order to prevent the completion of such act, or, if complete, to annul it.[2]

Nor, can the father indefinitely abuse his authority by systematically refusing his consent to the marriage of his children. Such cases are necessarily rare, the Islâmic system being opposed to monasticism and celibacy; still, as cupidity may prompt a father to refuse successive suitors for his daughter, the Kâzi or Hâkim-ush-Sharaa is authorised to interpose, provided on inquiry he finds *sufficient* and *reasonable* cause for so doing. In India, this function would probably be assumed by the Civil Court upon the application of the guardian next in order to the father. For example, a case may occur in which a mother is quite willing that her daughter should marry an eligible suitor, but the father, without any good reason and simply from caprice, withholds his consent. Under these circumstances the Civil Court would, under the Mahommedan Law, be authorised to restrain him from any interference with the marriage, and the order of the Court would be tantamount to the consent of the father.

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[1] *Fatâwa Alamgiri*, Vol I, p. 412; *Kitâb-ul-Anwâr*; *Jâmaa-ush-Shittât*.

[2] Sautayra; *Bukhâri*; *Jâmaa-ush-Shittât*.

What would be *sufficient* and *reasonable* cause to justify or warrant the interference of the Hâkim-ush-Sharaa would depend, of course, on the special circumstances of each individual case.[1]

Among the Hanafîs and the Shiahs, the children are emancipated from the *patria potestas* on attaining puberty ; an abuse of the paternal authority among the followers of these two sects is impossible where the children are adult and discreet. Should a father persist in refusing his consent to the marriage of his adult daughter, she can herself enter into a contract of marriage validly, even against his will and without his consent. "If the guardians of an adult and discreet virgin should refuse to marry her to an equal, when desired by her to do so, there is no doubt that she may enter into the contract of marriage against their will."[2] The *Jâmaa-ush-Shittât* says, in answer to the question,[3] "Is the consent or permission (*izn*) of the father *necessary* to the marriage (*akd*) of a virgin who is adult and discreet (*bâligha* and *rashîda*), ?" that such permission is not necessary, her own consent being enough, to make the contract valid in law.

If the marriage contracted by her is unequal, that is, should she contract herself in marriage to a person far inferior in rank or position, the father would have a right to object, but such objection must be urged before the Kâzi.

Among the Shâfeïtes and the Mâlikites, with whom a girl is not absolutely emancipated from the *patria potestas* until she is married, the abuse of the paternal authority is probably more frequent. The hardships occasionally entailed by the Shâfeï and Mâlikî doctrines are obviated by the facility accorded to the followers of the several Sunni schools, to attach themselves either to one school or the other, as inclination or conviction may suggest. For example, an unmarried girl of eighteen, who, according to the Mâlikîs, would remain subject to the father's authority until she was married, may at any time emancipate herself by declaring herself to belong to the Hanafî school.

This point was discussed at some length in the case of *Muhammad Ibrahim bin Muhammad Sayad Parkar* v. *Gulam Ahmed bin*

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[1] De Ménerville, *Jurisprudence de la Cour d'Alger*, p. 451.

[2] *Sharâya*, p. 263.

[3] *Jâmaa-ush-Shittât.*

Muhammad Sayad Roghe and another.[1] In this case a girl, named Khadîja, whose family were of the Shâfeï sect, had, on arriving at puberty, made a declaration before the Kâzi of Bombay that she had renounced the Shâfeï doctrines and had adopted the tenets of the Hanafîs. Shortly after this she was married to the plaintiff, apparently with her own consent and in accordance with the Hanafî rites. Her father, however, had never consented to her marriage with the plaintiff. In a suit brought by the plaintiff against the father for the unlawful detention of his wife, the principal legal question raised and discussed turned on the point whether the marriage contracted with the plaintiff was void in consequence of the girl's father not having consented to it. The Court, consisting of Sausse, C. J., and Couch, J., in an exhaustive and well-considered judgment, held (1) that, according to the Mahommedan Law, a Mussulman female belonging to any one of the four Sunni schools, "can, after attaining puberty, elect to belong to whichever of the other three sects she pleases, and the legality of her subsequent acts will be governed by the tenets of the Imâm whose follower she may have become;" (2) that, according to the doctrines of the Hanafîs, "a Mussulman female, after arriving at the age of puberty, without having been married by her father or guardian .... can select a husband without reference to the wishes of the father or guardian, though according to the doctrines of Shâfeï, a virgin, whether before or after puberty, cannot give herself in marriage without the consent of her father;" (3) that consequently the marriage contracted by Khadîja, by her own consent was valid and binding. The same principle would have applied if she had become a Shiah.[2]

When the father of a family is incompetent, by reason of mental incapacity, to exercise the right of *jabr*, the guardian next in order to him exercises that right, and he can, in the same way, when the

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[1] 2 Bombay High Court Reports, O. C. J., p. 236.

[2] "There is not any ceremonial required," added the learned Judges in the course of their judgment, 'to indicate the change of sect; the only outward difference between a follower of Shâfeï and a follower of Abû Hanîfa consists in the former, at the conclusion of prayer in a mosque, saying *Amîn* in a loud tone, whilst the latter pronounce it softly, and also that in praying, a Shâfeï extends his arms, whilst a Hanafî keeps them down.'"

father is absent at such a distance as precludes him from acting, lawfully contract a child in marriage.[1]

The *Jâmaa-ush-Shittât* gives examples of cases where marriages contracted by the mothers of infant children, during the absence of the fathers in distant townships, have been held to be valid.

Ghibât-ul-munkataa.

The nature of the absence or the distance, which would justify the exercise of the right of *jabr* by the guardian next in order to the father, is of particular importance, and has attracted the especial attention of the Mussulman jurists. The *Hedâya* says, " if the father or the first natural guardian of an infant should be removed to such a distance as is termed *ghibât-ul-munkataa*, it is in that case lawful for the guardian next in degree to contract the infant in marriage." And then it explains, " By the absence termed *ghibât-ul-munktaa*, is to be understood the guardian being removed to a city out of the track of the caravans or not visited by the caravans more than once in every year. *Some, however, have defined it to signify a distance amounting to three days' journey.*"[2]

According to the *Radd-ul-Muhtâr*, *ghibât-ul-munkataa* implies such a distance, or such an absence, as precludes the possibility of obtaining the father's sanction to any contract entered into by the next guardian on behalf of the infant, without serious inconvenience.[3] The *Fatâwa Alamgiri*[4] and the *Fatâwa Kâzi Khân* seem to point in the same direction. The general conclusion arrived at from the authorities quoted is that each case must be decided on its own individual basis.

The Calcutta High Court has decided that where a father is in prison, a marriage contracted for his infant daughter by the mother and grandmother without his consent is valid and binding.[5]

In another case, which was decided on the original side of the Calcutta High Court, it was held that the apostasy of the father led to the forfeiture of the right of *jabr*. In that case a Mahommedan female had married a Jew convert to Islâm. A female child

[1] *Fatâwa Alamgiri*, Vol. I, p. 401 ; *Fatâwa Kâzi Khân*, Vol I, p 406. According to the Shâfeïs, in the absence of the "preferential guardian," the right passes to the "Sultân and the Kâzi,"—*Kâzi Khân*, Vol. I, p. 406.

[2] *Hedâya.*

[3] See the Chapter on *Marriage.*

[4] *Fatâwa Alamgiri*, Vol. I, p. 401 ; *Fatâwa Kâzi Khân*, Vol. I, p. 406.

[5] 12 Weekly Reporter, p. 10.

was born of the union, who was brought up in the Shiah doctrines professed by the mother, although the father soon after its birth, had returned to his former faith. Subsequently, the mother contracted the girl in marriage to a Shiah Mussulman. Upon an application of the father to obtain possession of the person of the child, on the ground that the marriage contracted by the mother was invalid, inasmuch as he had not assented thereto, Macpherson, J., decided that, under the Mahommedan Law, an apostate is not entitled to exercise the right of assenting to the marriage of his children, who have been contracted by the guardian next in order to him ; and that, therefore, the marriage of the applicant's daughter was valid without his assent.[1]

A similar case is given in the *Jâmaa-ush-Shittât*. The question there put to the *Mujtahid* was, whether the marriage contracted by the mother on her daughter's behalf was valid without the consent of the father, who had become a pervert to Christianity. The answer was in the affirmative.

In the absence of the father, the Shâfeïs and the Shiahs allow the right of *jabr* to the grandfather.[2]

The Mâlikîs consider the right essentially personal, and belonging exclusively to the father in his quality of father. In the absence of the father the right, according to this school, passes to his executor or to the Kâzi.

The Hanafîs allow the right of *jabr* to all natural guardians. Hanafî doctrines.

"The guardians in marriage," says the *Sharh-ul-Vikâya*, "are the agnates or residuaries according to the same order as in inheritance and exclusion. By residuaries is meant residuaries in their own right, that is, males related without the intervention of females ; then the mother, then the distant kindred in order of proximity ; then the successors by contract (*mowla-al-mawâlât*), and then the Judge." "The guardianship (*wilâyèt*) in marriage belongs," says the *Fatâwa Alamgiri*, "in the first place to the *Asabâh*, in the order of inheritance, the more remote being excluded by the nearer."[3]

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[1] In *re Mahin Bibi*, 13 Bengal Law Reports, O. C. J., p. 160.

[2] Al-*Muharrar ; Kitâb-ul-Anwâr ; Mafâtîh ; Sharâya ; Ikhtilâf-ul Aimma ; Fatâwa Khâzi Khân*, Vol. I. pp. 405, 407.

[3] See *post*, Chapter on *Marriage*.

The nearest guardian to a woman is her son; then her son's son, how low soever; next her father; then her grandfather, that is, her father's father, how high soever. When an insane woman has a father and a son, or a grandfather and a son, the guardianship belongs to the son, according to Abû Hanîfa and Abû Yusuf, but to the father according to Mohammed. It is better, however, that the father should direct the son to give her in marriage, so that it may be lawful without any difference of opinion.[1] After the above persons, comes the full brother on the father's side; then the son of the full brother; then the son of the half-brother on the father's side, how low soever; then the full uncle; then the half-uncle on the father's side; then the son of the full uncle, then the son of the half-uncle on the father's side and their descendants; then the father's full paternal uncle; then his paternal half-uncle on the father's side; then the sons of both in the same order; then the grandfather's full paternal uncle; then his paternal half-uncle on the father's side, and then the sons of both, in the same order; then any *Asabâh* still further removed.

The order of these agnatic guardians may be stated shortly thus: (1) the lineal male descendants; (2) the lineal male ascendants; and (3) the male relatives in the order of succession; those related by both parents having precedence over those related by the father only. "All these guardians have the power of *jabr*," says the *Fatâwa Alamgiri* "over a female or male during minority."

According to the Hanafîs, in the absence of the *asabat-un-nasabiyè*, the right of *jabr* becomes vested in the *asabat-us-sababiyè*, in other words, the emancipator or emancipatress, "for in this case male and female are alike."

Shiah doctrines.

The Shiahs, as stated before, accord the right to the father and the grandfather, but deny it to every other relation; in this they agree with the Shâfeîs. According to the *Sharâya*, "an executor has no authority in marriage, even if it were expressly given by the testator; nor has the Judge any power over a person who is not adult."[2]

In the case of one who is devoid of intelligence, both the testamentary guardian and the Hâkim have a qualified authority.

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 583.

[2] *Sharâya*, p. 263; *Mafâtîh; Irshâd-ul-Allâmah.*

If the marriage be for the benefit of the *non compos mentis*, or for the protection of his interests it would be valid. If otherwise, it would be invalid.

Among the Hanafîs, in the absence of the agnates, the power is passed on to the uterine relations in the same order.[1] "Failing the *Asabâh*," says the *Fatâwa Alamgîri*, "every near uterine relative who may inherit from a minor, whether a boy or a girl, has the power of giving him or her in marriage, according to the *Zâhir-ur-Rawâyèt*. The nearest, according to Abû Hanîfa, is the mother, then the daughter, then the daughter of the son's son, then the daughter of the daughter's daughter, then the full-sister, then the half-sister on the father's side, then the half-brother and sister by the mother, then their children. After the children of the sisters, come paternal aunts, and the *false* or maternal grandfather is preferred to the sister, according to Abû Hanîfa; and in default of the uterine relations, the right devolves on the *mowla-al-mawâlât*, and in his absence on the ruler and the Kâzi." Hanafi doctrines

The Judge has the power of contracting a person in marriage, who requires a guardian, when it is within his commission and authority; but when it is not within his commission he is not the guardian. If a Judge should contract a minor in marriage when he has no authority from the Sultan for that purpose, and should afterwards, upon receiving such authority, give his sanction to the marriage, it would be lawful on a liberal construction of the law, "and this is correct."

"When the Judge marries a young girl to himself, it is a marriage without a guardian; for, in his personal concerns, he is a mere subject, and the guardianship devolves on the person above him, that is, the *wâli* or governor, who also is but a subject in his own matters. Nay, the Khalîfa (Caliph) himself is no more than a subject in things that regard himself."

It is lawful for the son of a paternal uncle to marry his uncle's daughter to himself. Supposing the Kâzi were to marry a young girl to his own son, the transaction would not be lawful, and is contrary to the case of all other guardians.

An executor has no authority to enter into a contract of marriage for or on behalf of an infant in marriage, whether he be appointed

[1] The mother comes in after the *Asabat-un-nasabiyè* and the *Asabat-us-sababiyè*.

by the father or not, unless he happens to be the natural guardian, in which case he would have the power by virtue of his relationship and not of his executorship. And if a boy and girl be both under the care or custody of a person who has brought them up, as, for instance, in the case of foundlings or orphans, he will have no authority to marry them to each other.

"A slave cannot be the guardian of any one; nor can a *mokâtib* be guardian to his own child. A minor or an insane person has no power of guardianship; and a non-Moslem cannot be guardian to a Moslem, whether male or female; nor a Moslem to an infidel, whether male or female." All this, it must be remembered, is for purposes of imposing the status of marriage, and not for guardianship in the sense in which the term is ordinarily used in the English language; the reason is obvious, for difference of faith may well furnish grounds for apprehension that the power will not be properly exercised.

"When a guardian becomes permanently insane, his guardianship ceases. But if he be one with lucid intervals, his guardianship does not cease, and his acts during a lucid interval have legal operation. Abû Hanîfa is reported to have said, that if the madness continues for a month without a lucid interval it is to be regarded as permanent, and the *Fatwa* is thereon."

According to the *Fatâwa Alamgiri*, the guardianship of the father continues over the person and property of a son who, though arrived at majority, is either a confirmed madman or has lucid intervals. But, when a youth had attained his majority in a state of sanity, and subsequently thereto became either a confirmed lunatic, or mad with lucid intervals, in such a case, according to Abû Yusuf, the guardianship does not revert to the father but passes on to the Judge; so that if the father should intermeddle with his property, or contract him in marriage, the act would not be legal.[1] And though there seems to be some difference of opinion among the lawyers, this view seems most conformable to right reasoning.

According to the Hanafîs, when a minor, whether male or female, has two guardians equal in degree as, for instance, two brothers or two paternal uncles, and either of them contracts the minor in

[1] *Fatâwa Alamgiri*, Vol. I, p. 400.

marriage, the transaction is lawful. "And," adds the *Fatâwa Alamgiri*, "it makes no difference whether the other of them allows or cancels the marriage. If they both contract her to different persons at the same time, or it is not known which contract was first, both contracts are void."

Contracts by a remote guardian.

When a minor, whether male or female, is contracted in marriage by a more distant guardian, while a nearer is present and competent to exercise the right, the contract is dependent on the sanction of the nearer; but if the nearer be incompetent by reason of minority or insanity the contract would be lawful. Similarly, if the nearer guardian be away at such a distance as precludes him from acting, the marriage contracted by the more remote would be lawful. The Imâms Sarakhsi and Mohammed ibn-ul-Fazl have held that the distance is to be calculated by the possibility of losing a present suitable match while inquiry is made for the opinion of the absent guardian. The *Fatwa* is to that effect. So if a nearer guardian be living in the same city, but concealed, "he is not to be waited for, and the absence is to be accounted as a precluding one." If a more remote guardian should contract a minor in marriage while a nearer guardian is present, the marriage would be suspended on the latter's sanction, and if he should then absent himself, in consequence of which the guardianship devolves upon the former, the marriage first contracted by the remoter would not be valid until sanctioned by him after such devolution of the guardianship.

Ghibat-ul-munkatua.

The guardianship of the nearer ceases during his absence and is transferred to the more remote, so that if the nearer guardian were to contract the minor during his absence, the contract would be unlawful, while if the more remote were to contract her, the contract would be lawful. The authority of the more remote guardian is annulled by the return of the nearer, but not so the contract which he may have actually made, for that was entered into while the authority was complete. All the jurists, however, are agreed that when the nearer guardian prevents a woman from marrying, or when a father or grandfather is profligate, the Judge may contract the woman to a *Kufu* (an equal).

The guardians of a boy and girl may marry them to each other against their will.

Under the Hanafî Law, if the mother be a testamentary guardian

or an executrix to her deceased husband, she would take precedence over all other persons.[1]

Under the Shiah Law the mother has no power of contracting her children in marriage, not even as executrix of the father.

Generally speaking, whilst a *wali-al-akrab*[2] is present, and is qualified to exercise the right of *jabr*, or to give his consent to a marriage contracted for his infant child, the mother has no power to marry such child against the wishes of the "preferable guardian." All the schools, however, seem to agree in holding that when the right is exercised by the *wali* prejudicially to the interests of the child, the mother has "a right to interfere." "When the father marries his poor daughter to a man equally poor," says Sidi Khalîl, "the mother has the right of intervention."

There are passages of like import in the (Shiah) *Jâmaa-ush-Shittât* and the (Hanafi) *Radd-ul-Muhtâr*, and the *Fatâwa Kâzi Khân*. A comparison of the views enunciated by the jurists of the various schools, leaves no doubt that the mother's right of interference will be regulated according to the exigencies of each particular case.

Shiah doctrines.

The Shiah Law on the subject of the *patria potestas* has been already sufficiently indicated. A few more examples taken from the *Sharâya* and the *Kitâb-ul-Intisâr* may not be without value. "No person," it is stated emphatically, "has any authority to contract another in marriage except a father, a paternal grandfather or other lineal male ascendant, an executor or a Judge." (I am leaving out the "master," as slavery, even in the mild form recognised in the primitive Mahommedan Law, does not exist in India.) The authority of a father and a paternal grandfather to contract the daughter or grand-daughter in marriage independently of her own wishes subsists so long as she is a minor; and she has no option of cancelling the contract on attaining majority. And this rule is applicable to a male child. A contract entered into on his behalf by the father or

[1] It is necessary here to mention that the passage in the *Fatâwa Alamgiri* leaves the matter in some doubt. The purport of it is that an executor has no authority to contract a male or a female minor in marriage . . . . except when the executor happens to be a natural guardian, and then he has the power, by virtue of his guardianship, not by his executorship. The mother, however, is a natural guardian. See the *Jurisprudence de la Cour d'Alger*, 1864.

[2] The nearest guardian.

grandfather would be binding on him, and he would have no option to cancel it on attaining puberty and discretion. But neither the father nor the grandfather has any power over an adult virgin who is discreet, for she is perfectly competent to contract a *permanent* marriage ; and if her guardians should refuse to marry her to an equal, when desired by her to do so, she has the power of contracting herself, even against the will of both, and they have no power whatever over a woman who is not a virgin, and has attained puberty and discretion, nor over an adult male. But when a person, though adult, appears to be a *non compos mentis* the father or grandfather may contract him or her in marriage, and "he has no option after restoration to reason."

The Hâkim-ush-sharaa is vested with authority only with respect to a person who has attained puberty without discretion, or one who has become insane, *when marriage is for his benefit.*

An executor has no authority in marriage, according to the most approved tradition, even if it were expressly given to him by his testator. But an executor may contract a person, who, though arrived at puberty, is deficient in understanding, when there is any necessity for contracting him in marriage.

The following provision throws considerable light on the manners of the people when these rules were promulgated. It is with reference to a person against whom the *fiat* of the Hâkim-ush-sharaa has issued declaring him to be a *mahjûr.* A person who has been inhibited for prodigality cannot lawfully marry, except in an extreme case ; and if he should do so, the marriage would be valid. But if he be desperately bent on marriage, the Judge may lawfully grant him permission to marry, either specifying a particular woman, or leaving the permission general, and if he should be impatient, and contract himself before obtaining the permission, being in the condition before mentioned, the marriage would be valid ; but if the dower be more than what is proper for a person of the same condition as the woman, it would be void as to the excess.

NOTE.

The Indian readers of this treatise will perhaps find it of some interest to know that, under the French Law, a man cannot marry until he has attained the age of eighteen, nor a woman until she is fifteen. The consent of both parents is required, by a son under twenty-five years of age, and a daughter under twenty-one. If the parents disagree as to the consent, the

father's sanction is held sufficient. If the parents are dead, then the consent of the grandfather and grandmother is requisite to contract a valid marriage. In their absence, the consent of the family council (*conseil de famille*[1]) must be obtained. Even when a man has attained his twenty-fifth year, and the woman her twenty-first, both are still bound to ask, by a formal notification, the consent of their parents, and until the man has attained his thirtieth year and the woman her twenty-fifth, this formal act must be repeated thrice at the interval of one month ; and one month after the third application, it is lawful for the parties to marry with or without consent. After the age of thirty a man or woman may legally marry without the consent of his or her natural guardians a month after formal notice has been served upon them by two notaries or by one notary and two witnesses.

Under the English Law, a person, whether male or female, cannot marry without the consent of the parents until the age of twenty, though amongst the operatives and colliers in Lancashire and amongst the agricultural labourers in England, they do contract such marriages in thousands.

[1] Code Napoléon, Art. 183.

CHAPTER V.

THE CUSTODY OF CHILDREN; (*AL-HIZANAT.*)

"THE *hâzina*," says the *Tanwîr-ul-Absâr*, "is the woman to whom belongs the rearing up of a child." And Khair-ud-din Ramli, (the author of the *Khairiyèh*,) says that the conditions of *hizânat* are that the *hâzina* should be free, adult, trustworthy and capable of bringing up the child, and not married to a stranger.[1]

[The word *hizânat* is given as *hazânat* in the *Misbâh*, the *Bahr-ur-Râik* and the *Nahr-ul-Fâik*.]

"The mother is of all persons," says the *Fatâwa Alamgiri*, "the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution."[2]

So also the *Radd-ul-Muhtâr*:—"The right of the *mother* to the custody of her child is established whether she be a *Moslemah* or *Kitâbia* or a *Majoosia*,[3] and even though she be separated from her husband. But it does not belong to one who is an apostate." The mother.

It will thus be seen that this right belongs to her *quâ* mother, and nothing can take it away from her except her own misconduct.

The paternal power, discussed in the previous chapter, is exercised over the person and property of infant children, presumably for their benefit. And when the tenderness of their age, or the

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 1092; The *Radd-ul-Muhtâr* is an extremely valuable and authoritative work on Mahommedan Law (*see* Vol. I, the *Introd.*). It purports to be a commentary on the *Durr-ul-Mukhtâr*, which again is a gloss on the *Tanwîr-ul-Absâr*. The texts quoted in the *Radd-ul-Muhtâr* are chiefly from the latter, whose author is referred to as *the* Author, whilst the author of the *Durr-ul-Mukhtâr* is referred to as the Commentator (*Shârih*).

[2] *Fatâwa Alamgiri*, Vol. I, p. 728.

[3] An example of a *Majoosia* mother is given thus:—"If both parents were Magians and the father adopted Islâm, and the mother remained in the old faith, still the mother would be entitled to the custody for her maternal love."

weakness of their sex, renders a mother's care necessary, the Mahommedan Law supports the mother's natural right to the custody of her children, and allows it to take precedence of the paternal right for a certain specified time.

When the children are no longer dependent on the mother's care, the father has a right to educate and take charge of them, and is entitled to the guardianship of their person in preference to the mother.

Hanafi doctrines.

Among the Hanafîs, the mother is entitled to the custody of her daughter until she arrives at puberty;[1] among the Mâlikîs, Shâfeïs, and Hanbalîs the custody continues until she is married.[2] According to the judgments of the Court of Algiers it appears that, in several notable instances, the Hanafî Kâzis have followed the Mâlikî doctrines, and decided that the mother is entitled to the custody of her daughters until their marriage.

Mâlikî rule.

An analysis of the dicta, contained in the authorities recognised among the eastern Hanafîs, leads to the conclusion that the difference between the doctrines of the Mâlikîs and the Hanafîs respecting the term during which the mother's custody lasts is not so great nor so marked as would at first appear. The *Fatâwa Alamgiri*, which gives the opinions of several jurists, points to the conclusion that the right of *hizânat* terminates when the girl is *marriageable*. The Mâlikîs hold that it should continue until she is *actually married*. As, in eastern countries, girls are generally contracted in marriage as soon as they are marriageable, and occasionally before they have arrived at maturity, it is apparent that there is practically no difference between the two schools. It may be remarked, however, that the Mâlikî doctrines are more conformable to right reasoning, and furnish a definite standard for the guidance of those who have to administer the law. Probably, the Anglo-Indian

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[1] *Fatâwa Alamgiri*, Vol. I p. 730; *Fatâwa Kâzi Khân*, Vol. I, p. 478.

[2] Sautayra, p. 348; Sidi Khâlil; *Radd-ul-Muhtâr* Vol. II, p. 1054. The *Radd-ul-Muhtâr* says, that according to Fakîh Abu 'l Lais, a mother and a grandmother (maternal as well as paternal) are entitled to the custody of a girl until puberty; but an aunt only up to nine or eleven, for she cannot exact the same amount of respect in teaching manners. According to Zailye, owing to the evil manners of the times this rule should apply also to a grandmother. "But as regards the mother this has reference to a woman who has been divorced from her husband."

Courts, in deciding questions bearing on this point, would follow the precedents of the Algerian Courts, which have adopted the Mâlikî rule as the guiding principle in all such cases.

As regards a girl who has been once married, the father or grandfather alone can insist upon her remaining with them if there is any fear of danger to her character or person. If the girl has no person with whom she may stop, the Judge, as the custodian of the interests of the public, may appoint some honest and proper Moslem female with whom she may live.

Custody of a male child.

There is greater divergence among the different Sunni schools with reference to the mother's custody of her male children. The Mâlikîs hold that the right of *hizânat*, in respect of a male child, continues until such time as he arrives at puberty. "This is the formal text of Sidi Khalîl," says Sautayra, "constantly applied in jurisprudence."[1]

Mâlikî rule.

Shâfeî doctrines.

The Shâfeïs and the Hanbalîs allow the boy, at the age of seven, the choice of living with either of its parents. Should he prefer to continue with his mother, he is allowed to do so until he attains the age of puberty, when he has no option and his guardianship devolves on the father. In practice, however, the father's right to the custody of the boy's person terminates with his puberty, for he is then *personally* emancipated from the *patria potestas*.[2]

The *Radd-ul-Muhtâr*, however, adds that even when a boy has attained puberty, the father may insist on his remaining in the paternal care if he be thoughtless or likely to go wrong. If the father is covetous of the property or earnings of the son, the Kâzi should appoint a trustee.

The Hanafî jurists, however, hold that the mother's *hizânat* of a male child ends with the completion of his seventh year. "The mother and the grandmother," says the *Fatâwa Alamgiri*, "are entitled to the custody of a boy until he is independent (of their care) that is, until he is seven years old."[3] But, adds the *Fatâwa Alamgiri*, "Kudûri has declared that the custody lasts until the boy is able to eat and drink and perform the necessary ablutions by

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[1] Sautayra, Vol. I. p. 348.

[2] *Kitâb-ul-Anwâr*; *Radd-ul-Muhtâr*, Vol. II, p. 1055.

[3] *Fatâwa Alamgiri*, p. 730; *Fatâwa Kâzi Khân*, Vol. I, p. 478.

himself; Abû Bakr ar-Râzi puts the limit at nine years; the *Fatwa* (however) is according to the first doctrine."[1]

So also the *Radd-ul-Muhtâr*, "the period when the male infant becomes independent of female care is seven years, and on this is the *Fatwa*."

Shiah doctrines.

Among the Shiahs, the mother is entitled to the custody of her children without distinction of sex until they are weaned.[2] During this period, which is limited to two years, the children cannot, under any circumstance, be removed from their mother's care without her consent. After the child has been weaned, its custody, if a male, devolves on the father, and if a female on the mother. The mother's custody of a female child continues to its seventh year; but the father may allow the mother to retain the custody of the children of both sexes beyond the period specified by the law.[3]

It will be seen that, though the period of *hizânat* varies among the different schools, the general principle, which governs its duration, is founded essentially on the interests of the child. "At the age of nine,"[4] says D'Ohsson, "a boy passes from the care of his female relations into the hands of his father, in order to receive from the father, a masculine education analogous to the paternal status, condition, and fortune."

When both the parents are of the same school it is easy to determine the period of the *hizânat*; but if they belong to different schools, the principle upon which the question of custody should be determined is not entirely free from difficulty.

It may be stated, as a general rule, that as the right of *hizânat* has in view the exclusive benefit of the infant, each particular case would be governed by the doctrine in force among the sect to which the child is supposed to belong; or, if that cannot be ascertained, by a consideration of what would be best for the child as a Moslem child. This rule has been adopted by the Court of Algiers, and no difficulty has been found in its application to individual cases.

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[1] D'Ohsson says, "The mother's right lasts in the case of male children up to the age of seven, eight or nine years; in the case of female children until their majority or their marriage," *Tab. Gen. de l'Empire Ottoman*, Vol. III, p. 104.

[2] *Jâmaa-ush-Shittât*; *Jâmaa-i-Abbasi*; *Sharâya-ul-Islâm*.

[3] *Jâmaa-ush-Shittât*.

[4] The Hanafis of Turkey seem to extend the duration of the *hizânat* up to nine years.

Judgment of the Court of Algiers.

The terms of the judgment delivered by the Court of Algiers, on the 15th of April 1872, leave no room for doubt on the question. In the case referred to, it appeared that one, Lakhal bin Mohammed, married a girl of the name of Ayesha bint Mustapha. A boy of the name of Mohammed was born of this union, after which a separation took place between Lakhal and Ayesha. When the boy reached the seventh year of his age, Lakhal applied to the Hanafî Kâzi to obtain possession of the child's person. The Kâzi of Algiers gave a decree in favour of Lakhal, but on appeal to the Court of Algiers, this judgment was reversed, and the child was allowed, in accordance with the Malîkî doctrines, to remain with the mother.

Subject to the limitations already pointed out as regards the duration of the *hizânat*, the custody of infant children devolves, in the first place, upon their female relations; and it is only when there are no female relations that the right descends to the male relatives.

The right of *hizânat*. Mâlikî doctrines.

The Mâlikîs differ to some extent from the Hanafîs respecting the order in which the right of custody is possessed by the various relations. For example, the Mâlikîs hold that, failing the mother of the child, the right passes (1) to the maternal grandmother; (2) to the great-grandmother; (3) to the maternal aunt and grand-aunt; (4) to the full sister; (5) to the uterine sister; (6) to the consanguine sister; and (7) to the paternal aunt. "When there are no relations of these degrees, or none qualified or willing to exercise the right of *hizânat*, it passes to the father, and failing him to his executor, his son, his nephew, his uncle, and his cousin."

Hanafî doctrines.

According to the Hanafîs, the order runs thus:—(1) the mother; (2) the mother's mother how remote soever; (3) then the father's mother; (4) then the grandfather's mother how high soever; (5) full sister; (6) uterine sister; (7) consanguine sister; (8) the daughter of the full sister; (9) the daughter of the uterine sister; (10) the full maternal aunt; (11) uterine maternal aunts; (12) consanguine sister's daughter; (13) brother's daughter; (14) full paternal aunt; (15) uterine paternal aunt; (16) consanguine paternal aunt; (17) mother's maternal aunt of the full blood; (18) mother's uterine paternal aunt; (19) then the consanguine; (20) father's maternal aunt of the full blood; (21) uterine; (22) consanguine;

(23) mother's paternal aunt of the full blood; (24) uterine; (25) consanguine.[1] The general principle upon which the right of these relations is founded, is common to both the schools, *viz.*, that "the custody of an infant belongs by right to the mother's relations, and those connected through her (that is, *uterine* relations) are preferred to those connected with the child on the father's side only (that is, the consanguine relations)."[2]

According to the Hanafis, if there be no female relations, or if none of them are legally qualified to exercise the right, it passes (1) to the father; (2) failing him, to the paternal grandfather; (3) to the lineal male ascendant of the third degree, or still higher; (4) to the full brother; (5) to the consanguine brother; (6) to the full brother's son; (7) to the consanguine brother's son; (8) full paternal uncle; (9) to the half-paternal uncle on the father's side; and (10) to the son of the paternal uncle in the same order.[3] Among these relations, also, the nearer always excludes the more remote.

The custody of a female child.

No male has a right to the custody of a female child unless he is a *mahram*, that is, within the prohibited degrees of relationship to her, and cannot under any circumstance marry her. Though a boy may be entrusted to the care of the paternal uncle's son, a girl cannot be placed under his guardianship, he not being a *mahram* to her.[4] The sons of aunts and uncles have no right to the custody of a female child not being within the prohibited degrees. Nor is an *Asabâh* who is profligate entitled to the custody of a female child.[5]

When there are no *Asabâh* qualified to take charge of the child, then the male *uterine* relations are given the charge, *e.g.*, the uterine brother; then, the maternal uncle, &c.

If there are several male uterine relations entitled to the custody of the child, then the one who most tenderly looks after the child's interests is entitled to preference, then the one most virtuous, and then the one senior in age.

But this principle is not restricted to the male *uterine* relations,

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[1] *Fatâwa Alamgiri*, Vol. I, pp. 728, 729.

[2] *Radd-ul-Muhtâr*, Vol. II, p. 1050; *Kitâb-ul-Anwâr*.

[3] *Ibid.*

[4] *Ibid*, p. 1051.

[5] *Fatâwa Alamgiri*, Vol. I, p 729.

for the *Hedâya* says when there are several relations of the same line or degree, all equally qualified and willing to take charge of the child, the custody should be entrusted to the one who shows the greatest tenderness to it.[1]

And, similarly, the *Radd-ul-Muhtâr*, "when there are several persons equally entitled to the *hizânat*, as full brothers or full paternal uncles, then the most virtuous among them should be given the charge, and if all are equally virtuous, then the senior among them in age has preference."[2]

The Judge.

In the absence of the natural guardians, or when none of them are qualified to take charge of a minor, the custody of the child devolves on the Judge, who should place the infant in the care of a trustworthy person of the same sex as the infant.[3]

A non-Moslem mother.

As stated already, the right of *hizânat* appertains equally to Moslem and non-Moslem mothers. When, therefore, a Moslem marries a non-Moslemah, and there are issue of that marriage, the mother is entitled to exercise the *hizânat* over her children, like a Moslem mother. Al-Karkhî explains that the right of *hizânat* belongs to a mother in her capacity and character of mother; and consequently she does not forfeit that right by the fact of belonging to any faith other than the Moslem faith. Apostasy and misconduct on the part of the mother being considered prejudicial to the interests of the children form a bar to their remaining in her custody.

The Shiahs.

The Shiahs are in agreement with the Sunnis with regard to the general principles governing the right of *hizânat*. But among them, in the absence of the mother, the right passes to the father, and failing him to the grandparents and other ascendants. When there are no ascendants, the right passes to the collaterals within the prohibited degrees, the nearer excluding the more remote.

Qualifications necessary for the *hazina*.

The qualifications necessary for the exercise of the right of *hizânat* are the following:—(1) that the *hâzina* should be of sound mind; (2) that she should be of an age which would qualify her to bestow on the child the care which it may need; (3) that

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[1] *Hedâya*, pp. 385, 386. 389

[2] *Radd-ul-Muhtâr*, Vol. II, p. 1051.

[3] *Fatâwa Alamgiri*, Vol. I, p. 736; *Radd-ul-Muhtâr*. About male relations, see *Musst. Fuseehun* v. *M* . *io*, I. L., 10 Cal., p. 15.

she should be well-conducted; and (4) that she should live in a place where the infant may not undergo any risk morally or physically.

Hizânat how lost.

The right of *hizânat* or custody, according to all the schools, is lost (1) by the subsequent marriage of the *hâzina;* (2) by her misconduct; and (3) by her changing her domicil so as to prevent the father or tutor from exercising the necessary supervision over the child.

1. The right of a woman to the custody of an infant child is made void by her marriage with a "stranger," the presumption of law being that a woman entering a new family will not have the same love or affection for the child as before.[1] The author of the *Radd-ul-Muhtâr* says, "The right of *hizânat* is lost by the mother (or any other woman) marrying a *ghair-mahram* of the infant, that is, one not related to the infant within the prohibited degrees, for a stranger would not be agreeable to her bringing up the child with affection and care." But if she were to marry a *mahram* or a relation of the infant within the prohibited degrees, the right of *hizânat* would not fall to the ground. For example, if a mother were to marry the child's paternal uncle, such marriage being valid under the Mahommedan Law, she would not forfeit her right to the custody of her infant children. But the *mahram* must be one by consanguinity.

The decisions of the Algerian Courts, which are strictly in accordance with the doctrines of the Mahommedan Law recognised by all the schools, furnish some leading principles which serve to explain and elucidate the exact significance of the above rule.

It has been decided by the Court of Algiers that when a mother, separated from her first husband, marries a second time in order to secure for her infant child better and more comfortable living, she does not forfeit her right of *hizânat*.[2]

The Courts would preserve to the mother the custody of the child, if it be in its interest that it should remain with her.

It has also been decided, in accordance with an authoritative *Fatwa*, delivered by the Mufti of the Madrassa of Algiers, that

[1] See *Musst. Fuseehun* v. *Musst. Kajo*, I. L., 10 Cal., p. 15.

[2] Decrees, dated 8th of October 1862, 29th of June 1865, and 9th of December 1867.

where the *hâzina* contracts a second marriage, and the father does not, within the space of one year from the date of such marriage, or from the date of his knowledge thereof, claim the person of the infant, he should be supposed to have abandoned his right over it, and it would remain thenceforward definitely under her care.

When the right of a mother or any other female relation lapses by marriage, it revives when the marriage is dissolved.[1]

2. The right of *hizânat* is lost by the misconduct of the *hâzina*. If she be found leading an immoral life or frequenting the society of women of ill-fame, or if she be convicted of theft, she forfeits her right to the custody of the infant.

The *Fatâwa Alamgiri* says, as we have seen before, that of all persons the mother is the best entitled to the custody of her infant children, "unless she be an apostate, an immoral woman, or one unworthy of being trusted."[2] It goes on to say, that a woman who habitually leaves her home and neglects her children, and allows them to starve, is unworthy of trust, *i.e.*, of having the custody of infants confided to her. The *Nahr-ul-Fâik* says, "a woman has no right to the custody of a child, if she be a thief, an adulteress, a public singer, or a professional mourner." The odium attached to the two latter classes of women originated in the fact that in Eastern countries, immorality is generally associated with the profession or calling they follow.

The *dicta* in the *Fatâwa Alamgiri* supply the general principle governing these cases, by declaring that the misconduct which would disqualify a mother, or any other female relation from exercising or claiming the *hizânat* of a child, is "such wickedness as would prove injurious to the child."[3]

An adulteress, who is in the habit of leaving her house and neglecting her child, is disentitled from claiming the right of *hizânat*.[4] The author of the *Bahr-ur-Râik* has stated that if a *Kitâbia* is entitled to the custody and next to her is a *Moslemah* who is ill-

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[1] *Fatâwa Alamgiri*, Vol. I. p. 728; *Radd-ul-Muhtâr*; *Fatâwa Kâzi Khân*, Vol. I, p. 478. There is no difference between the Shiahs and the Sunnis on these points.

[2] *Fatâwa Alamgiri*, Vol. I, p. 728.

[3] See the judgment of the Kâzi of Constantine, 16th of November 1860; *Jurisprudence de la Cour d'Alger*, De Ménerville.

[4] *Radd-ul-Muhtâr*, Vol. II, p. 1042.

conducted, the latter would, nevertheless, have preference. The author of the *Tanwîr-ul-Absâr* has not approved of this opinion, and has declared that no such distinction should be made, for the *Kitâbia* only follows her faith. Some jurists have stated that the distinction between a *Moslemah* and a *Kitâbia* is beside the point, for what must be considered in each case is what is good for the child, and its proper bringing up. Mufti Abû Saood has laid down that all cases of misconduct do not destroy the right of *hizânat;* what must be seen to is the benefit of or detriment to the child, the question being, is the woman's misconduct likely to injure the child? So also it is stated in the *Hâshiat-ul-Madani.*[1]

Similarly, if the mother is *ghair-mâmûnah* or untrustworthy. In the *Mujtaba*, the meaning of *ghair-mâmûnah* has been thus explained: that she goes out of the house at all times and leaves the child in a neglected condition, whether the going be without necessity or with necessity; for example, as when she is a peasant woman and goes out to cultivate her field, or is a midwife, or washer of corpses.

It will be seen, therefore, that a woman guilty of misconduct is not entitled to claim the right of custody. Similarly, if she were to misconduct herself *after* the right had vested in her, and the child had been confided to her care, she would forfeit the *hizânat*, and the father, or the person occupying his place, would take charge of the infant.

In the *Kinia*, however, it is stated, that she, even though immoral, may have the custody of a child, so long as no evil effect may be apprehended to the infant, and so long as her nurturing may be necessary for its benefit.[2]

Abasi v. *Dunne.*

The case of *Abasi* v. *Dunne*[3] was decided in the Allahabad High Court on the basis of the former principle. It was held that a public prostitute was disqualified from having the custody of her infant sister. This was no doubt in accordance with the Mahommedan Law; but no attention seems to have been paid in the decision of that case to the allegation of the plaintiff, that her sister was being brought up in the tenets of Christianity, by the people to whom her custody had been entrusted by the Magistrate. *Except in the case of a non-Moslemah mother*[4] the Mahommedan Law

[1] *Radd-ul-Muhtâr*, Vol. II, p. 1043.

[2] *Ibid*, p. 1042.

[3] I. L., 1 All., p. 598.

[4] *Al-Karkhi.*

does not permit the custody of a Moslem child to be confided to any other than a Moslem or Moslemah. The order of the Magistrate, therefore, in the case of *Abasi* v. *Dunne*, in pursuance of which the child was placed in a Christian orphanage and brought up as a Christian was illegal, and needed some notice from the High Court of Allahabad.

Apostasy also is a bar to the exercise of the right of *hizânat*. Consequently, a woman, who apostatises from the Islâmic faith, whether before or after the right vests in her, is disentitled from exercising or claiming the right of *hizânat* in respect of a Moslem child. Apostasy.

The provisions of Act XXI of 1850 make no alteration in the principles of the Mahommedan Law bearing on this subject. The effect of that Act is confined to questions of inheritance. Consequently a pervert to Christianity, though she may not lose her right of inheritance, would still forfeit her right of guardianship in respect of her infant relations. For example, if a man were to die leaving two daughters, one of whom is an infant, the elder one would, in the absence of other female relatives, be entitled to the custody of her sister. If, however, it appeared that she had apostatised from Islâm previous to the decease of her father, she would be disqualified from claiming the *hizânat* of her sister, though her right of inheritance would be preserved to her by Act XXI of 1850.

Under the Hindu Law, unchastity in a woman is a bar to succession, but if property has once vested in her it would not be forfeited by her subsequent unchastity.

Under the Mussulman Law, unchastity does not disqualify a woman from succession, though in the interests of public morality it disqualifies her from exercising the right of *hizânat*.

3. The right of *hizânat* is also liable to forfeiture in case the *hâzina* removes the child, without the consent of its father or guardian, to such a distance from his usual place of residence as would prevent him from exercising the necessary supervision or control over her.[1] But this rule is subject to considerable qualification. When the change of residence is caused by unavoidable exigencies, or when it has been made for the benefit of the child, Removal of the child by the *hâzina*.

[1] *Fatâwa Alamgiri*, Vol. I, p. 731 ; *Jâmaa-ush-Shittât*.

the right of *hizânat* is not lost. For example, a woman, who earns her livelihood by going into service, may be obliged to follow her employers from one place to another and take her child with her. The frequent change of residence resulting from the necessities of employment would not lead to the forfeiture of her right of custody. If a woman were to attempt to remove with her child from the usual place of residence, and the husband were to apply to the Kâzi or Magistrate to obtain the person of the infant upon the ground of its removal, the Magistrate would be bound to inquire into the facts of the case, and, on being satisfied that the removal is only temporary or undertaken in the interests of the child, to allow it to remain in the mother's custody.[1]

Whilst the marriage subsists "the conjugal domicil is the place of *hizânat*;" thus the home where the parents usually reside and live together as husband and wife is the place where the child should be brought up. Accordingly, the father cannot leave the city where they are residing and take the child with him out of the custody of the mother without her consent.[2]

When a separation has taken place between the parents, the mother is entitled to return with her infant child to her native city (if the marriage took place there), however distant it may be from the residence of the father. "But," adds the *Fatâwa Alamgiri*, "she cannot do so if the marriage did not take place there, unless it is so near the place of separation that if the husband should leave his own residence in the morning to visit the child, he can return home before night;"[3] nor can she "remove to any other city on any other condition."

The following passage from the *Hedâya* explains the principle more fully:—"To the propriety of the woman carrying her child from one place to another, two points are essentially necessary—

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[1] *Jurisprudence de la Cour d'Alger*, De Ménerville.

[2] *Fatâwa Alamgiri*, Vol. I, p. 731; *Kitâb-ul-Anwâr*.

[3] *Hedâya* (English Translation), Vol. I, p. 391. The passage which follows is worthy of note:—"Nor is there any objection to her removing from the village to the city or chief town of a district, as this is in no respect injurious to the father, and is advantageous to the child . . . . but the reverse (that is, her removal from a city to a village) would be injurious to the child, as he would thereby be liable to acquire the low manners and mean sentiments of villagers; wherefore a woman is not at liberty to carry her child from a city to a village, unless it is her native place and the marriage was celebrated there.

first, that she be a *native* of the place to which she goes, and, second, that her marriage took place there."

"This, however, means only where the places are considerably distant; but if they be so near that the father may go to see his child and return the same night, there is no objection to the wife going to the place with the child and there remaining; and this whatever be the size and degree of the places, whether cities or villages."

Mâlikî doctrines.

According to the Mâlikî jurists, a distance of six *birîds*[1] implies such distance as would prevent the father from exercising control or supervision over the mother. Each case, however, is decided, in spite of the apparently hard and fast rule of the Hanafîs and the Mâlikîs, upon its own merits.

The following remarks of M. Sautayra contain the essence of the rule applicable to this branch of the law relating to *hizânat*.

"Ajoutons qu'il en est de la règle relative à l'èloignement de la *hâzina*, comme de celle édictée en cas du subséquent mariage; l'intérêt de l'enfant l'importe sur toutes les autres considérations, et les juges ont la faculté de subordonner l'application de la règle aux circonstances de fait. C'est ainsi, pour n'en citer qu'un exemple, que la femme Zainab a été autorisée à quitter Tlemcen pour se rendre, avec son nouveau mari à Mostaganem et à conserver la *hizânat* sur fille qu'elle avait eue d'un précédent mariage, parce qu'il a été établi que le premier mari avait, pendant plusieurs années, abondonné sa fille et qu'il ne présentait aucune garantie pour les soins à lui donner.[2] Jugement du 29 Mars 1865, confirmé par arrêt du 29 Juin suivant."

If the father remove from his usual place of residence or from the place where the *hâzina* is residing and exercising the rights of *hizânat*, he would have, under certain circumstances, the power of withdrawing the child from the *hâzina's* custody. This power, also, is strictly subordinated to the interests of the child. If the infant be independent of the mother's care, if it be doubtful whether she would, when freed from the supervision of the father, bestow the

[1] A *birîd* is equal to four *farsangs*, each *farsang* being equal to three miles of 1,700 mètres each.

[2] Sautayra, p. 355.

same care and tenderness on the child as before, then the Kâzi may, in his discretion, grant the father's application to remove the child.

The principle which should guide the decisions of the Magistrate in those cases is laid down in most explicit terms in a decree of the Court of Algiers, dated the 11th of February 1862. "Considérant," it says, "qu'il s'agit de savoir si le père, voulant partir pour la Mecque et s'y établir définitivement, peut, ainsi qu'il le prétend et que l'a décidé le jugement attaqué, emmener sa fille avec lui, malgré les protestations de sa mère ; considérant qu'il est de principe en droit musulman comme en droit français, que lorsqu'il s'agit de statuer sur le sort d'un enfant appartenant a des parents divorcés, on doit rechercher principalement quel est le principal intérêt de l'enfant, et décider en conséquence à qui, du père ou de la mère, il doit être remis ; considérant a cet égard, qu'indépendamment des hasards que le voyage projeté entraîne pour la jeune fille, sa translation et son établissement à la Mecque présentent des dangers encore plus réels ; qu'en effet le père et la nouvelle épouse sont l'un et l'autre d'un age avancé ; que dans un temps prochain ils pourraient venir à manquer à la jeune fille et la laisser isolée, sans appui dans un pays lontain, *tandis qu'à Alger elle resterait sous les yeux de sa mère*, qui lui a toujours prodigué les soins les plus tendres, et dont la conduite est irréprochable ; qu'elle y trouverait encore la protection les secours et les conseils des fréres et des autres parents de sa mère, qui tous lui portent le plus vif intérêt ; . . . . ordonne que la fille restera sous la garde de sa mêre."

This decision shows plainly the governing principle in all questions of *hizânat*. The right is founded primarily for the benefit of the child, and is to be exercised by those relations who are most likely to bestow care and kindness on it. The case of *Lardli Begum* v. *Mohammed Amir Khan*[1] does not seem to have looked at the question of *hizânat* from this point of view.

Lardli Begum v. *Mohammed Amir Khan.*

According to the *Sirâjia*, the father can take his infant child away with him only when the *hâzina* has lost her right and there is no one else upon whom it devolves in succession to her. But the moment the right reverts to the *hâzina*, the child must be brought back and made over to her. For example, if the mother

[1] I. L. 14 Cal., p. 615.

had separated from the father of the child, and lost the *hizânat* owing to her having married another person, and this husband dies, the right reverts to her. But in the *Sharnbilâlièh* it is stated that the father has no such right of removal; and in the *Hâwi* it is laid down that, he can not remove the child to such a distance that the mother cannot see it every day if she chose. "This must be borne in mind."[1] In other words, this is the principle which must govern all such cases.

Hizânat a personal right.

The right of *hizânat* is a personal right, which the parties entitled can enforce by a judicial proceeding. Act VIII of 1890 (the Guardians and Wards Act) which has repealed Act IX of 1861 and Act XL of 1858, lays down the procedure for the appointment of guardians for the person and property of minors, being persons who have not attained their majority under the provisions of Act IX of 1875 (the Indian Majority Act.) The provisions of section 17 of Act VIII of 1890 are worthy of note. It says :—

Act VIII of 1890.

(1) "In appointing or declaring the guardians of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) "In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian, and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) "If the minor is old enough to form an intelligent preference, the Court may consider that preference."

These provisions are in conformity with the Mahommedan Law.

Under this Act, therefore, the discretionary powers, vested in the Kâzis under the Mussulman Law, are vested in the High Courts and the principal Civil Court of original jurisdiction in a district, and such Courts are bound to administer strictly, in all questions affecting the custody of Moslem children, the provisions of the Mussulman Law regarding *hizânat*.

The mother is entitled to the custody of her infant female child who happens to be married until she attains puberty.[2] In the case

[1] *Radd-ul-Muhtâr*, Vol. II, p. 1058. [2] *Radd-ul-Muhtâr*, Vol. II, p. 1056.

Mother's custody of her infant female child who is married.

of *Khatija Bibi*,[1] a husband applied that his wife, stated in the return to a writ of *habeas corpus* to be "an infant under the age of sixteen years, to wit of the age of eleven years or thereabouts," might be delivered over into his custody. The Court, on the ground that she had not attained the age of puberty, and that her dower had not been paid, refused to order her to be taken from the custody of the mother, although the mother had taken her away secretly, in the absence of her father and husband from Bandari, where they were all living together, to Calcutta.

If a mother were not to agree to nurture or take care of an infant without remuneration or compensation, and the father be not in a position to pay any, and some other woman, relation or stranger, be willing to bring up the child free of charge, the custody will be given to the latter. So in the *Hâshiat-ul-Madani*.[2]

Similarly, where the infant has no female relation other than one who is not willing to bring it up without being paid for the same, but it has a paternal uncle's son who is willing to bring it up without payment, the infant may be confided to his care; no compulsion should be exercised on any woman to whom the right of nurture belongs to take charge of the child, if she herself be unwilling, for her unwillingness may arise from inability, unless the child will not take any other breast or the father has no means to employ a nurse.[3]

In the *Zahîria* it is stated that if the child has no other female relation excepting one to undertake its charge, she may be compelled to do so.

The mother can on no account give up her right of *hizânat;* for even if she were to obtain a *khulâ* in lieu of abandoning her right to her child's custody, the *khulâ* will be valid, and she will retain her right of *hizânat*.[4]

If the woman has no house, the father will have to provide her with one with such attendants as the child may require according to his means. According to the Shâfeïs, if the child is possessed of means, the habitation and attendants must be provided from its

[1] *In the matter of Khatija Bibi*, 5 B. L. R., p, 557. See *In the matter of Mahin Bibi*, 13 B. L. R. p. 160.

[2] *Radd-ul-Muhtâr*, Vol. II, p. 1045.

[3] *Fatâwa Kâzi Khân*.

[4] *Radd-ul-Muhtâr*, Vol. II, p. 1050.

property. But if it has no property, all its expenses will appertain to the person who is liable for its maintenance. And Khair-ud-dîn Ramli (the author of the *Khairiyèh*) has stated that this rule obtains also amongst "us," *viz.*, the Hanafîs.

When a non-Moslemah, even though she be a Magian or Zoroastrian is entitled to the *hizânat*, she stands on the same footing as a Moslemah, until the child is able to understand religious matters. In the *Nahr-ul-Fâik*, it is stated that it is proper to fix the age for the comprehension of religion at seven years, or at such period when it is apprehended the child might become attached to *Kufr*, in other words, the denial of God and of the messengership of the Prophet, owing to companionship with one who is a "denier."[1]

As the right of the *hâzina* becomes void by her marrying a "stranger;" so does it become on her taking up her abode with one who does not love the child. For example, as is stated in the *Kinia*, if a woman, after the death of her husband leaving an infant child, were to marry a stranger; and the mother's mother were to keep the child in the same house with the stranger, the executor of the father would be entitled to insist that the *hâzina* (the mother's mother) should live with the child at some other place. According to the *Nahr-ul-Fâik*, the *hâzina* is entitled to keep the child with her in the house of her own husband. For example, if an aunt is entitled to the custody of an infant, no objection can be raised to *her* husband on the ground of his being a stranger.[2]

A paternal uncle's son is in the position of a stranger, so that if the mother of a child were to marry the son of its paternal uncle, her right of *hizânat* would become void. So also with foster-relations, *e.g.*, if the woman were to marry a foster-uncle or foster-father of the child, the position would be the same, and the right of *hizânat* would fall to the ground.

When the second husband becomes absolutely separated from the woman, or is dead, the right revives.

The custody of illegitimate children appertains exclusively to the mother and her relations. If a child be a foundling, its custody belongs to the person who found it, or to the State.[3]

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[1] *Radd-ul-Muhtâr*, Vol. II, p 1052.

[2] *Ibid*, p. 1052.

[3] *Tab. Gen. de l'Empire Ottoman*, Vol. III, p, 101.

Though a mother is entitled to take her child to her native city, no other female *hâzina* has a similar right.[1]

A foundling.

A foundling is called a *lakît*, something taken up from the ground; and the person picking it up is called the *multakit*. "A *lakît*," says the *Radd-ul-Muhtâr*, "is an infant who has been thrown away or abandoned by its parents, or one of them, either from want, or to conceal the shame of adultery. Any one who finds a *lakît* and does not pick it up, *i.e.*, allows it to die, commits a great sin; and he who picks it up will get his reward [from God]. To pick it up is a religious duty (*Farz-ul-kifâya*), and if the *multakit* is certain that its being neglected will cause the child's death, and there is nobody else there, its picking up is an obligatory religious duty (*Farz-ul-ain*). . . . Kindness to children is the best of human actions, and to save one life is to give life to mankind, for God has said, 'he who has saved a life has saved the human kind.' The *lakît* will be free, enjoying all the privileges of being a Mussulman. . . . The food, raiment, lodging, medicine, all that the foundling needs, appertain to the *Bait-ul-Mâl*. . . . And when the boy has grown up, and has been contracted in marriage by the Sultan, the dower he may have to pay will be paid out of the *Bait-ul-Mâl*."

"If the *lakît* has any property, its expenses will be paid out of the same, or if any relation of his is discovered anywhere, such expenses will be paid by such relation. . . . . Any fine incurred by the *lakît*, in case it has no property and no known relation, will be paid from the *Bait-ul-Mâl*. . . .

"It is not lawful for anybody else to take the child away from the *multakit*. Whether the sovereign can do so is a subject of discussion. In the *Fath-ul-Kadîr* it is stated it is not lawful, and the Author [of the *Tanwîr-ul-Absâr*] has, following the author of the *Bahr*-[*ur-Râik*], maintained the same view. In the *Nahr-ul-Fâik* it is stated that the Sultan may remove the child from the custody of the *multakit*, if he considers the latter to be not fit for having its custody. . . .

"If anyone were to take away forcibly a *lakît* from the *multakit*, and he were to sue for the child, the *lakît* will be restored to him, but it will not be restored to him if he made over the child voluntarily to the person whom he now sues."

[1] *Fatâwa Alamgiri*, Vol. I, p. 731.

"When two persons claim the person of a *lakît*, it will be given to him who has preference over the other: *e.g.*, if a Moslem and a Christian are the rival claimants, the child will be given to the Moslem.[1] But if they are both equal, then it is left to the decision of the Kâzi to consider whose custody will be most beneficial to the child; and this is according to the *Bahr-ur-Râik*. If one of them claim to be the father of the child, in that case, if the child be alive, *nasab* would be established. If it be dead, he will have to establish it by proof.[2] This is according to the *Khânièh*."[3]

"In the *Munia* it is stated that if more than two persons claim the *nasab* of a child, then, according to Abû Hanîfa, it may be adjudged to them all if they are not more than five." In other words, all of them will have to contribute to its support.

"If a married woman were to claim a *lakît* as her child, her claim would be valid, if her husband affirms her statement or the midwife proves the birth, or one man and two women establish the same. But if the woman has no husband, in that case she may establish her claim by the evidence of two males. . . .

"When two women are rival claimants to a *lakît*, the one who establishes her claim by evidence, will get the child. If they both produce evidence, the child will be adjudged as the child of both. On this the Disciples differ; they think the child will not be adjudged as the child of either. All this is from the *Khânièh*. If two persons claim to be the *multakit* of a foundling child, and one is able to describe some special marks on the person or clothing of the child, then the Kâzi may give the child to him, unless there are other reasons in the evidence of the other to counterbalance the weight of these matters. . . . But if their claims are equal, the Kâzi may give [the support of] the child to both." . . .

"If a child is found in the quarters of the Moslems, or at the door of their mosque, or any place frequented by them chiefly, it will belong exclusively to Islâm. . . .

"Any property found with the *lakît* will belong exclusively to the child and the *multakit* or any person to whom its custody is

[1] This is according to Kâzi Khân.

[2] Because when the child is alive any property found with him will be applied to his needs. But in case it is dead, it is possible that the person alleging himself its father may do so from greed. Hence, the necessity of proof.

[3] *Fatâwa Kâzi Khân.*

entrusted will spend it over the foundling under the directions of the Kâzi."

"The *multakit* is entitled to apprentice the foundling to learn some craft or to put him to school; and to take charge of anything given to the child by others by way of gift or alms. But he cannot have him circumcised. . .

"The *multakit* can take the foundling with him from one place to another, but he ought not to remove him from the city into the country as that may be prejudicial to the child. . . The guardianship of a *lakît* belongs primarily to the sovereign."[1]

[1] *Radd-ul-Muhtâr*, Vol. III, pp. 484—490.

CHAPTER VI.

THE STATUS OF MARRIAGE.

SECTION I.

GENERAL OBSERVATIONS.

"MARRIAGE," says the *Ashbâh*, "is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity." . . . . Marriage ordained for the protection of society.

"Marriage is a sacrament, insomuch that in this world it is an act of *ibâdat* or worship, for it preserves mankind free from pollution." . . .

"It is instituted by divine command among members of the human species." . . .

"Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union." . . .

"It does not give the man any right over the person of the wife except for mutual relationship according to the law of nature and not contrary to it.[1] This is clearly laid down in the *Badâya.*". . . .

"It is allowed between two people of different sexes to whose mutual cohabitation there is no natural or legal bar or prohibition. For example, a man cannot marry a hermaphrodite nor any woman within the degrees prohibited by divine law. . . .

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[1] The Mussulman Law is far more stringent than either the Civil or the Canonical (Christian) Law in protecting women from injuries. This point has been often ignored by those whose acquaintance with Mahommedan Law is derived from the few books on the subject in the English language. Under the Sunni Law the dower settled on a wife becomes due wholly or partly when the parties have been in a situation where connubial intercourse might take place, whether as a matter of fact they have cohabited together or not. This is called "valid retirement." Under the Shiah Law "consummation" alone effectuates the contract, but for the protection of the woman it is laid down that any act of familiarity would make the dower due.

"And being ordained among members of the human species a man cannot marry a being of another kind."

"Marriage is obligatory on a person whose passions cannot otherwise be restrained from the commission of wrongs or from hankering after what has been prohibited, and who can maintain a wife properly. But it is not sinful for one who is continent to abstain from marriage." . . .

"Asceticism, however, is disapproved of as it leads to many evils."

"If two people of different sexes intermarry with the object of guarding themselves from foulness and unchastity and procreating children and rearing them up tenderly, the act is pious. If it is only for self-indulgence, the act is not pious." . . .

"It is unlawful to oppress or coerce a woman into marriage, or to obtain her consent by force or coercion, or to compel her to marriage."[1]

According to the *Kifâya*, "marriage is a contract which has for its design or object the procreation of children; it was also instituted for the solace of life, and is one of the prime or original necessities of man. It is, therefore, lawful in extreme old age after the hope of offspring has ceased, and even in the last or death illness."[2]

"The intercourse of a man with a woman, who is not his wife," says the *Hedâya*,[3] "is unlawful, and prohibited absolutely. When there is neither the reality nor the semblance of this relation between the parties, their intercourse is termed *zina* or fornication, and subjects them both to the *hadd*,[4] or a specific punishment for vindicating the rights of Almighty God."[5]

"A knowledge of the illegality, however," says the *Fatâwa Alamgiri*, "is a condition essential to the infliction of the *hadd*. The Shubh. punishment, therefore, cannot be inflicted when there is a semblance

[1] The above is from the *Radd-ul-Muhtâr*.

[2] *Kifâya*, Vol. III, p. 577.

[3] *Hedâya*, Vol. II, p. 586.

[4] *Fatâwa Alamgiri*, Vol. II, p. 202.

[5] The *hadd* of *zina* in early times used to be stoning to death, if the offending party was "*muhsan*," and scourging, if not, with a hundred stripes for one who was free, and fifty for a slave. A *muhsan* is a person who is free, sane, adult, a Moslem, and married by a valid contract that had been actually consummated, to one in whom the same qualities are combined. But under a dictum of the Caliph Ali, the stoning to death in the majority of cases was commuted to scourging.

of right, and it is waived even in some cases where the semblance is only imaginary. Semblance is thus of several kinds: First, semblance in the fact, or *shubh fi'l fial*, also termed *shubh ishtibâh*, or semblance of assumption; which is, when a person supposes that something is a proof of right which is not so in reality; as, for instance, when he imagines that the slave of his wife is lawful to him, because he may make use of her services. But the benefit of this kind of semblance is allowed only with reference to the person who supposes it to exist, and he must claim that he thought the intercourse to be lawful. If he do so, he would be exempted from the *hadd;* but otherwise it must be inflicted, because the intercourse is in reality *zina*. Second, semblance in the subject, or *shubh fi'l mahal*, also termed *shubh hukmia* (legal semblance), because there is some actual proof of lawful right in the woman, though connection with her may, for some reason, be prohibited. Regard is, therefore, to be had to this semblance with reference to all persons, and its establishment is not dependent on the conception of the offender and his claim of legality, for the connection is not positively *zina*. Third, semblance in the contract, or *shubh fi'l akd;* and, according to Abû Hanîfa, wherever a contract of marriage has taken place, whether it be lawful or unlawful, and whether the illegality be one on which all are agreed, or with respect to which there is some difference of opinion, and whether the party be aware of the illegality or not, he is not liable to the *hadd;* but, according to the two Disciples, when the marriage is one that is generally admitted to be unlawful, there is no *shubh* or semblance of right, and the party is liable to the *hadd, if he was aware that there is none*, though otherwise he would be exempted. It follows, therefore, that, in the opinion of Abû Hanîfa, connection under any contract of marriage is not *zina;* and that, in the opinion of the Disciples, whenever a contract of marriage is universally allowed to be unlawful, connection under it is *zina*."[1]

Walad-uz-zina.

"The offspring of a connection where the man has no right nor semblance of right in the woman, by marriage or slavery, is termed *walad-uz-zina*, or child of *zina*, and is necessarily illegitimate,"[2]

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[1] *Fatâwa Alamgiri*, Vol. II, p. 208.

[2] *Ibid*, p. 209.

"According to a tradition of the Prophet reported in the *Jâmaa-ut-Tirmizi*,[1] the Faithful are directed to contract marriages in mosques and to give publicity to the same." . . . .

"And it is most commendable to contract a marriage on a Friday."

"It is not sinful to have music at a wedding."[2]

Marriage as a civil institution.

Regarded as a social institution, marriage, under the Mahommedan Law, is essentially a civil contract. Its validity depends on proposal on one side and acceptance on the other. It does not insist upon any particular form in which the contractual performance should be effectuated. And though, among the Sunnis the presence of witnesses is necessary to the validity of a marriage, their absence only renders it invalid, which is cured by consummation. In fact, a marriage-contract as a civil institution rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers; and, according to some of the schools, have power to dissolve the marriage-tie, should circumstances render this desirable.[3]

"Marriage, like other contracts," to use the words of Mr. Baillie, "is constituted by *ijâb wa kabul* or declaration and acceptance" . . . but it confers no right on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of entering into all contracts regarding it, of suing and being sued without his consent, as if she were still unmarrried. She can even sue her husband himself, without the intervention of a trustee or next friend, and is in no respect under his legal guardianship.

In the language of the law, as well as in common parlance, the formal conclusion of the contract is called *akd*, conveying the same meaning as the term *obligation* in the Roman Law. In fact, the *akd* is the completion of the contract which commences with the proposal or demand in marriage and ends with the consent.

The *Radd-ul-Muhtâr* says that *akd* signifies both proposal and assent, and that the word means the contract of marriage as well as cohabitation.[4]

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 429.

[2] *Ibid*, p. 420.

[3] See *ante*, p. 17.

[4] *Radd-ul-Muhtâr*, Vol. II, pp. 425, 429.

Capacity.

The validity of a marriage under the Mahommedan Law depends on two conditions: first, on the capacity of the parties to marry each other; secondly, on the celebration of the marriage according to the forms prescribed in the place where the marriage is celebrated, or which would impress on the woman by the customary law of the Mussulmans the status of a wife. It is a recognised principle of law that the capacity of each of the parties to a marriage is to be judged of by their respective *lex domicilii*. "If they are each, whether belonging to the same country or to different countries, capable according to their *lex domicilii* of marriage with the other, they have the capacity required by the rule under consideration. In short, as in other contracts so in that of marriage, personal capacity must depend on the law of domicil."[1]

The *capacity* of a Mussulman domiciled in England will be regulated by the English Law, but the capacity of one who is domiciled in the *Bilâd-ul-Islâm* by the provisions of the Mussulman Law. It is, therefore, important to consider what the requisite conditions are to vest in an individual the capacity to enter into a valid contract of marriage. As a general rule, it may be remarked, that under the Islâmic Law the capacity to contract a valid marriage rests on the same basis as the capacity to enter into any other contract.

The capacity to contract marriage.

"Among the conditions which are requisite for the validity of a contract of marriage," says the *Fatâwa Alamgiri*,[2] "are understanding, puberty and freedom in the contracting parties, with this difference that whilst the first requisite is essentially necessary for the validity of the marriage, as a marriage cannot be contracted by a *majnûn* (*non compos mentis*), or a boy without understanding; the other two conditions are required only to give operation to the contract, as the marriage contracted by a (minor) boy (possessed) of understanding is dependent for its operation on the consent of his guardian." Puberty and discretion constitute, accordingly, the essential conditions of the capacity to enter into a valid contract of marriage. A person who is an infant in the eye of the law is disqualified from entering into any legal transactions (*tassurufât-ush-shariyèh*), and is consequently incompetent to contract a marriage. Like the English Common Law, however,

[1] Dicey on *Domicil*.

[2] *Fatâwa Alamgiri*, Vol. I, p. 377; *Fatâwa Kâzi Khân*, Vol. I, p. 380.

the Mahommedan Law makes a distinction between a contract made by a minor possessed of discretion or understanding (a *sarîr*), and one made by a child who does not possess understanding (a *saghîr*). A marriage contracted by a minor who has not arrived at the age of discretion, or who does not possess understanding, or who cannot comprehend the consequences of the act, is a mere nullity.

The Mahommedan Law fixes no particular age when discretion should be presumed. Under the English Law, however, the age of seven marks the difference between want of understanding in children and capacity to comprehend the legal effects of particular acts. The Indian Penal Code also has fixed the age of seven as the period when the liability for offences should commence. It may be assumed, perhaps not without some reason, that the same principle ought to govern cases under the Mahommedan Law; that is, when a contract of marriage is entered into by a child under the age of seven, it will be regarded as a nullity.[1]

It is otherwise, however, in the case of a marriage contracted by a *sarîr*. "It is valid," says the *Fatâwa Alamgiri*, "though dependent for its operation on the consent of the guardian."[2]

A contract entered into by a person who is insane is null and void, unless it is made during a lucid interval.

A slave cannot enter into a contract of marriage without the consent of his master. The Mussulman lawyers therefore add freedom (*hurriyèt*) as one of the conditions to the capacity for marriage.

Majority.

Majority is presumed among the Hanafîs and the Shiahs, on the completion of the fifteenth year, in the case of both males and females, unless there is any evidence to show that puberty was attained earlier.

Shamsunnissa v. Ashrafunnissa and others.

In the case of *Shamsunnissa* v. *Ashrafunnissa and others*,[3] it was held by the Sudder Court of Calcutta that the declaration of a girl that she was adult, when there was nothing in her appearance to lead to the contrary conclusion, would be accepted to establish majority.

Besides puberty and discretion, the *capacity to marry* requires that there should be no legal disability, or bar to the union of the

[1] Comp. Bishop on *Marriage and Divorce* (3rd Ed.), s. 194.

[2] *Fatâwa Alamgiri*, Vol. I, p. 377. The *Fatâwa* calls the minor *sabî-ul-âkil*.

[3] See Morley's Digest, Vol. I, p. 303.

parties ;[1] that, in fact, they should not be within the *prohibited degrees*, or so related to or connected with each other as to make their union unlawful.

Section II.

The Legal Disabilities to Marriage (Asbab-ut-Tahrim).[2]

Capacity: legal disabilities.

The prohibitions against certain kinds of marriage are more numerous in the Mussulman Law than in the "Code Civil," but they present, in the main, the same features as the French and English Law with respect to the prohibited degrees.

The prohibitions may be divided into four heads, viz., *relative* or *absolute*, *prohibitive* or *directory*.

They arise in the first place from legitimate and illegitimate relationship of blood (*consanguinity*)[3] ; secondly, from alliance or affinity (المصاهرة *al-musâ-herèt*) ;[4] thirdly, from fosterage (الرضا *ar-Razâ*) ; and, fourthly, according to the schools which recognise polygamy, from *completion of number*.

According to Caussin de Perceval, the ancient Arabs permitted the union of step-mothers and mothers-in-law on one side, and step-sons and sons-in-law on the other.[5] The Koran expressly forbade this custom. "Marry not women," says the Koran, "whom your fathers have had to wife (except what is already past), for this is an uncleanness, an abomination, and an evil way."[6] Then come the more difinite prohibitions : "Ye are forbidden to marry your mothers, your daughters, your sisters,[7] and your aunts, both on the father's and on the mother's side ; your brothers' daughters and your sisters' daughers ; your mothers who have given you suck, and your foster-sisters ; your wives' mothers ; your daughters-in-law born of your wives with whom ye have cohabited." . . . . . "Ye are also prohibited to take to wife two sisters (except what is already past), nor to marry women who are already married."

The prohibitions founded on consanguinity, (the *tahrîm-un-nasab*), are the same among the Sunnis as among the Shiahs. No marriage

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[1] *Fatâwa Alamgiri*, Vol. I, p. 378 ; *Irshâd-ul-Allâmah* ; *Jâmaa-ush-Shittât*.

[2] *Ibid* p. 385 ; *Fatâwa Kâzi Khân*, Vol. I, p. 380 ; *Sharâya*, p. 263 ; *Mafâtih*.

[3] The cause of prohibition (*tahrîm-un-nasab*) arising from consanguinity.—*Sharâya*, p. 266 ; *Fatâwa Alamgiri*, Vol. I, p. 385, (*al-Mahramât-bin-nasab*).

[4] *Ibid*, p. 386.

[5] *Hist. des Arabes*, Vol. I, p. 351.

[6] Koran, chap. iv.. v. 27.

[7] Among the ancient Egyptians and Persians such marriages were allowed.

can be contracted, (*a*) with the ascendants, (*b*) with the descendants, (*c*) with relations of the second rank, such as brothers and sisters or their descendants, (*d*) with paternal and maternal uncles and aunts. Nor can a marriage be contracted with a natural offspring or his or her descendants.

According to the *Bahr-ur-Râik*, marriage is forbidden on the ground of consanguinity with the following women :—

(*a*) mother and all female ascendants.

(*b*) daughter and all female descendants, how low soever.

(*c*) sister and her female descendants, how low soever.

(*d*) brothers' daughter, how low soever.

(*e*) fathers' sister, (but not her daughter or any other descendant).

(*f*) mothers' sister, (but not her daughter or any other descendant.)

Nor is one forbidden to marry his uncle's daughters. "These rules are applicable to both men and women. For example, as a man is forbidden to marry his sisters' or brothers' daughters, so is it forbidden for a woman to marry her brother's or sister's son, and so on."

Sunni prohibitions for affinity.

2. The second ground of prohibition is founded on *affinity*, and this is created not only by a valid or invalid contract of marriage, but also by adulterous intercourse. "Even a woman who has been 'touched with desire' by a man becomes forbidden to his ascendants and descendants, and her female descendants and ascendants become forbidden to him."[1] And when a valid marriage has been contracted with a woman, her mother and other female ancestors and her daughter become forbidden to the man, even though there may not have been consummation.

Affinity therefore prohibits to the man the following women :—

(*a*) mother-in-law, how high soever.

(*b*) wives' daughters, how low soever.

(*c*) son's wife, how low soever that is, son's son's wife, &c., or any woman with whom a son or grandson, &c., has cohabited or "whom he has touched with desire."

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[1] "Touching with desire" means any act of familiarity between a man and woman. The age of nine, on the part of a girl, is presumed to be the earliest age when this may occur. All these provisions are intended for the protection of women.

(*d*) so also step-mothers or any woman with whom the father or any other ancestor has committed fornication.

The rule is applicable to both men and women. As a man cannot marry his son's wife, so a woman cannot marry her daughter's husband.

Accordingly, sisters, full, consanguine or uterine, by valid or invalid marriage or adulterous connection, are forbidden.

So the daughters of such sister, as well as the aunts by *nikâh* or adulterous connection. This applies to both men and women.

According to the Shâfeïs, however, an adulterous connection does not give rise to the *prohibition* of affinity. In this, they differ from both the Hanafis and the Shiahs. Shâfeï doctrine.

According to the Shiahs, any act of impudicity between two adolescent youths creates a "perpetual prohibition" against either of them intermarrying with the female relations of the other.[1]

4. It is forbidden also to marry another man's wife or *muattadah*, *viz.*, one who is undergoing the *iddat* or probation either on account of death or divorce.

Among the Shiahs, marriage is forbidden for fosterage in the same order as in the case of *nasab*. The Sunnis, however, permit marriage in spite of fosterage in the following cases :— Fosterage.

(1) The marriage of the father of the child, with the mother of his child's foster-mother ;

(2) with her daughter ;

(3) the marriage of the foster-mother with the brother of the child whom she has fostered;

(4) the marriage with the foster-mother of an uncle or aunt. The relationship by fosterage arises amongst the Shiahs when the child has been really nourished at the breast of the foster-mother.[2]

There is no difference among the Sunnis and the Shiahs regarding the prohibitions arising from affinity.

As already stated, the prohibitions springing from *consanguinity*,

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[1] This is apart from the severe punishment for which the offence itself is liable.

[2] Among the Shiahs, it is required that the child should have been suckled at least fifteen times, or at least a day and night; among the Hanafis it is enough if it had been suckled only once; among the Shâfeïs, it is necessary that it should have been suckled four times.

fosterage and *affinity* are applicable to both man and woman. What is forbidden to the man is forbidden to the woman.[1]

So far the absolute prohibitions.

Relative prohibitions.

The *relative* prohibitions spring from causes which render the marriage only invalid. For example:—

1. Among the schools which recognise polygamy, it is forbidden to contract contemporaneous marriages with two women so related to each other, that, supposing either of them to be a male, a marriage between them would be illegal.

But such a marriage is only *invalid* according to these schools, for the first wife may be divorced, when the defect would be removed. *The children of the second union are in no case illegitimate.* But whilst the children inherit from the father, the mother does not.

2. Nor, according to these schools, can a man marry a fifth when he has completed the number tolerated in the Koran, *viz.*, four. This is called illegality springing from *completion of number*. But again, this is only invalid, for the man may, (as these schools allow,) divorce any of the previous four wives, when the fifth connection would be valid.

3. A woman may not marry her own slave. But she may emancipate him, and then marry him if she chooses.

4. A man may not marry, according to the *Bahr-ur-Râik*, his slave-girl whilst he has a lawful wife.

Law regarding intermarriages between Moslems and non-Moslems.

5. The fifth *relative* prohibition springs from *shirk* or polytheism. The observant student of the law of the two principal sects which divide the world of Islâm, cannot fail to notice the distinctive peculiarity existing between them in respect of their attitude to outside people. The nations, which adopted the Shiah doctrines, do not seem to have come into contact to any marked extent with the Christian races of the West, whilst their relations with the Mago-Zoroastrians of the East were both intimate and lasting. The Sunnis, on the other hand, seem always to have been more or less influenced by the Western nations. In consequence of the different positions which the followers of the two sects occupied towards non-Moslems, a wide divergence exists between the Shiah and Sunni schools of law regarding intermarriages between Moslems and non-Moslems.

It has already been pointed out that the Koran, for political reasons, forbade all unions between Mussulmans and idolators. It said in explicit terms, "Marry not a woman of the Polytheists (*Mushrikîn*) until she embraces Islâm." But it also declared that "such women as are *Muhsinas* (of chaste reputation) belonging to the scriptural sects," or believing in a revealed or moral religion, "are lawful to Moslems."

From these and similar directions two somewhat divergent conclusions have been drawn by the lawyers of the two schools. The Sunnis recognise as legal and valid a marriage contracted between a Moslem on one side and a Hebrew or a Christian woman on the other.[1] They hold, however, that a marriage between a Mussulman and a Magian or a Hindoo woman is invalid. The *Usûli* Shiahs and the Mutazalas agree with the Sunni doctors, They emphatically recognise the validity of a permanent contract of marriage between a Moslem and a female belonging to "the scriptural sects," or believing in God. A section of the *Akhbâri* Shiahs does not recognise as legal a permanent contract of marriage between Moslems and the follower of any other creed. They allow, however, temporary contracts extending over a certain specified period, with a Christian, Jew, or a Magian female.[2]

Sunni doctrines.

Usûlis and Mutazalas.

Akhbâri Shiahs.

Both schools prohibit a Moslem from marrying an idolatrous female, or one who worships the stars or any kind of fetish whatsoever.

These prohibitions are relative in their nature and in their effect. They do not imply the absolute nullity of the marriage. For example, when a Mahommedan marries a Hindoo woman, the marriage is only invalid and does not affect the legitimacy of the offspring.

Marriage with a Hindoo woman; children legitimate.

I have already described the reasons which led to the prohibition of intermarriages between Moslems and idolatrous females (which is the real signification of *Mushrikîn*); and also between non-Moslems and Moslemahs. In either case, as already stated, though the marriage is invalid, the issue of the union are legitimate.

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[1] *Hedâya* Vol. I, p. 85; *Fatâwa Alamgiri*, Vol. I.p. 398. Abû Hanîfa permits a Mussulman to marry a Sabean woman, but Abû Yusuf and Mohammed and the other Sunni Imâms hold such unions illegal.

[2] *Mafâtîh; Sharâya*, p. 274. According to the Shiahs, Mago-Zoroastrianism is one of the revealed religions.

Marriage forbidden with a woman pregnant by her husband.

According to all the sects, it is unlawful to contract a marriage with a woman who is *enceinte*, if it be known that the pregnancy is from her husband or master, whether he be a *Moslem*, *Zimmi* (non-Moslem subject), or *harbi* (an alien enemy), and whether it is by a valid or an invalid marriage, or a mere semblance of marriage, or 'ownership by the right hand.'[1] "It is reported from Abû Hanîfa that a marriage with a refugee woman coming from the enemy's country is valid, though she may be pregnant by her husband, but Zailye has held its prohibition to be correct, and this is reliable, and in the *Fath-ul-Kadîr* it is laid down that the prohibition is the accepted doctrine."[2]

Lawful with one pregnant by fornication.

But, according to the Hanafîs, it is lawful for a man to contract a marriage with a woman who is pregnant by fornication with somebody else; though connubial intercourse is forbidden until she is delivered.[3] This is the opinion of Abû Hanîfa and Mohammed. Abû Yusuf differs from them and holds such an union as invalid, but "the *Fatwa* is with Abû Hanîfa and Mohammed."

Shâfeïs.

The Shâfeïs, Mâlikîs and Hanbâlîs hold the same doctrine as Abû Yusuf.

Where a woman is pregnant by fornication with the same man who marries her, the marriage is lawful, and connubial intercourse is not forbidden between them. On this there is *consensus*. The Shâfeïs and Shiahs agree with the Hanafîs on this point, and Abû Yusuf holds the same opinion as Abû Hanîfa and Mohammed.

"And the *nasab* of the child born of the womb of the woman would be established in the man if it is born at six months or more from the date of marriage."[4] "But if born within six months its *nasab* would not be established, and it will not inherit to the husband of its mother, *unless* he says that it is his child and does not add that it is his by fornication. In that case, *nasab* will be established. This is according to the *Khânièh* (*Fatâwa Kâzi Khân*). . . . If he says it is by *zina*, *nasab* will not be established. But if he does not mention *zina* distinctly, *nasab* will be established, for in this there is the possibility of the pregnancy having taken place from a previous marriage (between him and the woman) or from an invalid contract; and the conduct of a Moslem should always

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 477.
[2] *Ibid.*
[3] *Ibid*, p. 478.
[4] *Ibid.*

be attributed to proper motives, so possibly there might have been a prior contract."[1]

Shiah Law. Marriage with a pregnant woman.

Among the Shiahs, there seems to be some difference of opinion regarding the validity of a marriage contracted by a man with a woman who is pregnant by adulterous intercourse with another. One writer, (the Fâzil-ul-Kâshâni,) seems to think there ought to be no marriage until the woman is delivered. The weight of authority, however, is in favour of the lawfulness of the union. The *Jawâhir-ul-Kalâm* says, "If a (married) woman became pregnant by fornication, after which her husband divorced her, in such a case her *iddat* would be according to the ordinary probation as if she had not committed fornication and was not pregnant thereby. For what has been stated as to a pregnant woman's *iddat* lasting until her delivery does not apply to pregnancy by fornication. In this case the ordinary probation should be calculated. And I have found no difference on this point. If such a woman were to marry another person after the (ordinary) *iddat*, it would be lawful; and I have found no difference thereon, for the delivery is not the period of probation for a woman pregnant by fornication. Similarly, if a woman, who has no husband, is pregnant by *zina*, there is no difference (*i.e.*, all are agreed) as to the validity of her marriage (during such pregnancy) with a person [other than the adulterer]."

Similarly, it is stated in the *Hadâik*, that "if a woman is pregnant by *zina*, there is no *iddat* for her, and she can lawfully intermarry with another before delivery."

In the *Mafâtîh* also it is laid down that, "the accepted doctrine is there is no *iddat* for an adulteress whether she be pregnant or not by fornication, . . . and if she be pregnant, it is lawful for her to marry before delivery."

At the same time, in order to keep the *nasab* pure it is recommended that a man should not marry a woman who is pregnant by fornication with another until she is delivered.[2]

Re-marriage with a woman separated by *laân*, forbidden. Shiah doctrine.

Under the Shiah Law, a woman against whom a proceeding by *laân* has taken place on the ground of her adultery, and who is thereby divorced from her husband cannot under any circumstance re-marry him. The Shâfeîs and Mâlikîs agree in this opinion with

[1] *Radd-ul-Muhtâr*, Vol. II, p. 478.

[2] *Mafâtîh*.

Allowed under the Hanafi Law.

the Shiahs. The Hanafîs, however, allow a re-marriage with a woman divorced by *laân*.

Some Shiahs think that the niece of a wife may be validly married with the consent of the wife. But this union is considered invalid by the majority of this sect as well as by the Sunnis.

Ihrâm.

Among the Shâfeïs, Mâlikîs and Hanbalîs, marriages are prohibited during the state of *Ihrâm* (pilgrimage to Mecca), so that when a marriage is contracted by two persons either of whom is a follower of the doctrines of the above-mentioned schools whilst on the pilgrimage, it is invalid. The Hanafîs regard such marriages to be legal. The *Fatâwa Alamgiri* says distinctly that "it is lawful for a *Muhrim* and *Muhrimah* to intermarry while in the state of *ihrâm*." With the Shiahs, though a marriage in a state of *ihrâm* is not lawful, the woman is not prohibited to the man always, unless he was aware of the illegality of the union.

The form of marriage.

There are several other conditions laid down in the Mussulman law works for the contractual performance of marriage, all of which when properly considered resolve themselves to a mere question of form. For example, it is required (*a*) that the parties to the contract "should hear each other's words," that is, the conditions of the contract should be understood by both; (*b*) that, if *sui juris*, they should actually consent to the contract; and (*c*) that the husband and wife should be distinctly specified, so that there should be no doubt as to their identity.[1] Regarding these formal conditions the Sunnis and the Shiahs are agreed, but whilst the former insist that the declaration and acceptance "should take place at one and the same meeting," and that "the acceptance should not be discrepant from the declaration," the latter hold that "it is not a condition that the acceptance should *verbally* agree with the declaration."[2]

Testimony.

Under the Sunni Law, it is also a condition that there should be witnesses present to attest the conclusion of the contract.

Under the Shiah Law, "the presence of witnesses is not necessary in any matter regarding marriage; and if a marriage were contracted by the spouses themselves or their guardians in private, it

[1] *Fatâwa Alamgiri*, pp. 377, 378 and 381; *Sharâya*, p. 263

[2] *Jâmaa-ush-Shittât*; *Mafâtih*; *Sharâya*, p. 262.

would be valid ; even if there were an *injunction* to secrecy, that would not invalidate it."[1]

Difference between the Sunnis and the Shiahs.

In fact, the great point of difference between the Sunnis and the Shiahs on the subject of marriage is, that whilst the former insist on the presence of witnesses at the contractual performance, they do not require any testimony for the dissolution of the contract by the husband ; on the other hand, the Shiahs do not require any evidence of marriage so long as the parties agree that it was performed regularly, but they insist upon the presence of witnesses for the dissolution of the contract.

The law appoints no specific ceremony for the celebration of a marriage ; and no religious rites are necessary for the contraction of a valid marriage.

Section III.

Local Forms.

In India, as well as in other Mahommedan countries, many local forms have become associated with the performance of the matrimonial contract. The validity or invalidity of a marriage, however, does not depend in any way on the performance or non-performance of the forms and ceremonies that have been engrafted on Moslem manners and customs by contact with outside races.[2]

Legally, a marriage contracted between two persons possessing the capacity to enter into the contract, is valid and binding, if entered into by mutual consent, in the presence of two witnesses. As already stated, the Shiah Law dispenses even with the latter provision.

"When a man," says the *Sharâya*, "has declared himself to be the husband of a woman, and she has assented to the truth of the declaration, or when a woman, has declared herself to be the wife of a man, and he has acquiesced therein, they are judged to be ostensibly married."[3]

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[1] *Sharâya*, p. 262.

[2] For the ceremonies usually performed at Mahommedan marriages see Van Lennep's *Bible Lands;* Lane's *Manners and Customs of the Egyptian People;* Mrs. Meer Hassan Ali's *Observations on the Mussulmans of India* and Herklot's *Qanoon-i-Islam.*

[3] Compare the cases cited in the *Jâmaa-ush-Shittât.*

It may be stated, as a general principle, that a Mahommedan marriage requires no particular or formal rites to constitute it valid in law ; that a marriage is legal and binding if celebrated *per verba de præsenti*.

In consequence, however, of the ceremonies practised in India, it is usual to find two *distinct local* forms existing side by side. The first is the *urfi* (customary) form ; the second the *sharaï* (or strictly legal form). The *urfi* marriage is celebrated among the Shiahs and the Sunnis with elaborate ceremonies, similar to those practised in Turkey, and described with so much particularity by D'Ohsson. The *sharaï* marriages require no ceremonies (the *rusûmât*). In the *sharaï* form of marriage, the simple directions of the law are only complied with.

As the terms *urfi* and *sharaï* occur frequently in cases where the legitimacy of a child is in dispute or the fact of its mother's marriage is questioned, it is necessary to bear in mind the difference between these two forms of marriage. At the same time, it must not be forgotten that so far as the legal consequences of a marriage are concerned, it is equally valid whether it is celebrated in the *urfi* or in the *sharaï* form. Of course, in the case of an *urfi* marriage, the publicity with which the rites are performed ensures the probability of satisfactory evidence forthcoming at any time, should a dispute arise regarding the *factum* of the contract. In a *sharaï* form, on the contrary, the legal forms only are complied with, and consequently there is little publicity ; and therefore, when it becomes necessary in such cases to produce reliable testimony of the marriage, the task is by no means so easy as in the *urfi* form, unless the marriage has been registered.[1]

First marriages, even among the poorer classes, are frequently solemnised in the *urfi* form. It must be added, however, that the *urfi* form is rapidly falling into disuse, owing to the extravagance and waste connected with it.

[1] Under the Mahommedan Marriage Registration Act, which is in force in some parts of Bengal, it is optional with the parties or their guardians to register the marriage. At the time the Bill was about to be passed into law, the author pressed on the authorities the advisability of making the registration compulsory, but other counsels prevailed. It has since been acknowledged that great difficulties arise in the administration of justice from the permissive character of the Act. In Algiers, and in most Mahommedan countries, registration is compulsory.

In India, there is little difference between the rites that are practised at the marriage ceremonies of the Shiahs and the Sunnis. Al[illegible]arriages commence with betrothal (*mangnî*) which extends [illegible] years, months or weeks, as the case may be. They may take [illegible] between minors as well as between grown-up people.

[illegible]arriages are celebrated, generally speaking, in the house of [illegible]de's father or guardian in the presence of the agents (*wakîls*), [illegible] of the parties, and the guests, some of whom become wit- [illegible] to the deed of marriage. In this document are embodied [illegible] conditions to which the husband binds himself, together with [illegible]mount of the antenuptial settlement, the nature of its pay- [illegible], questions regarding the custody of the children, and other [illegible]ate matters. It is attested by the *walîs* (guardians), the *wakîls* [illegible]nts), if any, of the bride and the bridegroom, and the wit- [illegible]es. In certain parts of India, notably in Lower Bengal, the absence of a deed formally embodying the terms of the marriage contract is an unusual circumstance in respectable families, especially in the case of a first marriage or when both the parties belong to the same rank or occupy the same position in life. The document is called a *Kâbîn-nâmèh*.

Marriage how celebrated.

But *Kâbîn-nâmèhs* are unknown in Behar, in the North-West Provinces and other important tracts. Among the Shiahs of Lucknow and several other places, the *Mujtahid's* register is the sole record of the amount of dower and conditions of marriage.

Practically, as stated before, there is little or no difference between the ceremonials (*rusûmât*) observed by the Shiahs and the Sunnis on these occasions. Theoretically, however, there is a difference which ought not to be lost sight of in dealing with the question of *form*. Whilst the Sunnis simply *recommend* the use of the *Khutba* before the contract is finally executed, and of the *Surât-ul-Fâtiha* (the opening chapter of the Koran) at the conclusion of the marriage, the Shiahs consider the use of these to be, to some extent, obligatory.

Among them, the ceremony commences as well as concludes with a prayer, and after the *sîghèh*[1] has been pronounced, the

[1] The *sîghêh* is common to both Sunnis and Shiahs. It is the oral declaration of the engagement, and is pronounced in words almost sacramental in their character on the completion, or conclusion of the ceremony, to mark it as irrevocable.

person who officiates as minister or priest, reads the *Khutba* and the *Sûrat-ul-Fâtiha* to sanctify and bless the union.

Marriage, how contracted, Hanafi Law.

"Marriage is contracted," says the *Hedâya*, "by means of dec -a- tion and consent, both expressed in the preterite."[1] Accordi the *Hâwi-ul-Kudsi*, it is not necessary that the proposal sl always precede assent, or that the proposal should come fron side particularly. So long as there is intelligent assent proposal for a permanent contract it is valid. In making th posal as well as in expressing assent, the past tense is used the *Radd-ul-Muhtâr*, in order that the contract may not be re to a future time. But it adds significantly, marriage doe depend on the use of any express terms so long as the purpo distinctly understood; and may, therefore, be contracted ir present tense.

Shiah Law.

Under the Shiah Law, however, it is not necessary that parties should use the past tense. As long as the acceptance is natural consequence of the proposal or declaration, and sufficient expresses the intention of the consenting parties, it is valid in law

Declaration, in the language of the law, signifies the propos made by one of the contracting parties, and *consent*, the acceptanc of the declaration by the other.

Proposal and acceptance may be made and given either by the principals or their proxies or guardians.

The words by which marriage may be contracted. Sunni doctrines.

Among the Sunnis, marriage may be contracted by the use of the words *nikâh* or *tazwîj* (marriage), which are express in their meaning; or of the terms *hiba* (gift), *tamlîk* (appropriation), or *bai* (sale), which convey the sense of the intended matrimonial contract implicatively.

The *Kifâya* is very explicit on this point. "The words by which marriage is contracted are of two kinds, *sarîh*, or plain, and *kinâyèt*, or ambiguous. The *sarîh* or plain, are *nikâh* and *tazwîj*. All the others are *kinâyèt*, or ambiguous, and they comprehend every word that is employed to effect an immediate owner-

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[1] *Hedâya*, Vol. I (Eng. Transl.), p. 72. "There are only two tenses in the Arabic verb, the preterite and the aorist. The latter being employed to express present and future time, is ambiguous, and the preterite is commonly used in contracts, for though its proper function is to relate to the *past*, it is employed in law in a creative sense to meet the necessity of the case."

[2] *Sharâya*.

ship in a specific thing. Thus, marriage is contracted by *hiba* or gift, *tamlîk*, or transfer, and *sadakah*, or alms. So also by the word *bai*, or sale: as if a woman should say, 'I have sold myself to thee,' or a father should say, 'I have sold my daughter to thee for so much;' and in like manner it is contracted by the word *shirra* or purchase; as if a man should say to a woman, 'Thou art mine,' or 'hast become mine,' and she should answer 'yes.' So also if he should say, 'Be my wife for a hundred,' or 'I have given you a hundred that you may be my wife,' and she should accept, it is a marriage. If a woman irrevocably repudiated should say, 'I have restored myself to thee,' and the husband should answer, 'I have accepted,' in the presenece of witnesses, that is marriage. So also if a man, after he has repudiated his wife three times, or irrevocably, should say, 'I have recalled thee on so much,' and the woman is content, and the transaction takes place in the presence of witnesses, it is a valid marriage; and it would be so even though no mention were made of any property, provided that both parties are agreed that the husband intended marriage. But if the same words were addressed to a stranger, and the woman should consent, there would be no contract."

Shiah doctrines.

The Shiahs, on the contrary, hold that a valid marriage can only be contracted by the use of the words *nikâh* or *tazwîj* (both of which imply exclusively matrimony). They declare all marriages contracted by the use of any other expression as *invalid*.[1] But when a marriage has been contracted by the expressions recognised as illegal under the Shiah Law, and has been consummated, the law attaches to it all the incidents and liabilities of a marriage validly contracted.[2]

Both Sunnis and Shiahs agree in holding that a marriage cannot be contracted by the use of the expressions *ijâra* (lease) or *ariyèt* (loan).

"Marriage is not contracted," says the *Fatâwa Alamgiri*," by the words *ijârat* or hiring, *iârat* or lending, *ibâhat* or permitting, *ihlâl* or legalizing, *tumuttooâ* or enjoying, *ijâzat* or allowing, *razâ* or being content, and the like. Nor by the words *sulh*, compounding, and *barâat*, releasing; nor the words *shirkat* or partnership, and *itâk*, emancipating; nor by the word *wasiat*,

[1] *Sharâya-ul-Islâm*, p. 262; *Mufâtih*. [2] *Jâmaa-ush-Shittât*.

bequeathing; for though that is a cause of property, its effect is postponed till after death."[1]

"There is some difference as to the words *karz*, or lending, and *rahn*, or pledging; but the sound opinion is that which negatives the contract. It has been said, however, that the contract of marriage may be effected by means of the word *karz*, according to *Istihsân* (liberal interpretation) of the doctrines of Abû Hanîfa and Mohammed; for with them the inherent meaning of *karz* is an exchange of property for property, which is the definition of sale; and this has been approved."

Any expression conveying intention sufficient.

Any expression, in fact, which conveys the idea of the two persons agreeing to cohabit together piously and chastely with the object of procreating children and rearing them up is sufficient for a valid contract of marriage. And, therefore, implicative expressions are allowed as sufficient.

Arabic terms not necessary.

Foreign words, also, are sufficient if they convey the meaning of marriage, and it is not necessary that the words used should be Arabic.

Similarly, if an illiterate person were to mispronounce a word, or if a member of a non-Arabic community were to pronounce incorrectly the Arabic words in ordinary use among Arabic-speaking people, the validity of the contract will not be affected thereby so long as the intention is to contract a marriage.[2]

"And the Shaikh-ul-Islâm Abû Saood, Mufti of Turkey, has given *Fatwa* to the effect that where among communities or people wrong words are in vogue or the Arabic words are mispronounced and they are used with the object of contracting marriage, such marriage is lawful."[3]

"The common use of wrong words among ignorant people may be regarded as a new language. And the words, therefore, are to be taken as valid, for the chief point to be regarded is the intention. For prayers, even, are not vitiated when a foreigner or an ignorant person mispronounces his words."[4]

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[1] Compare this with the remarks of Mr. Bishop regarding the phrases which would create a binding marriage contract between the parties.

[2] *Radd-ul-Muhtâr*, Vol. I, p. 442.

[3] *Ibid.*

[4] *Ibid*, p. 443.

Where an [Arabic-knowing] individual *knowingly* mispronounces his words the author of the *Tanwîr-ul-Absâr* holds such marriage not to be valid.

As already stated, according to both the Hanafis and the Shiahs, a marriage cannot be contracted by the use of the expressions *ijâra* (lease), or *ariyèt*, or such like words as give rise to temporary obligations. The *Durr-ul-Mukhtâr* says a marriage contracted by such expressions is not valid, because there is no permanency in them; but they refer only to the enjoyment of the usufruct, whereas in *nikâh*, permanency is an absolute condition.[1]

Marriage contracted by expressions not authorised.

But if a marriage be, as a matter of fact, contracted by any such expressions, and the parties cohabit after such marriage, the man will not be liable for the *hadd* or punishment for adultery, and the woman will get her dower but less than that specified, unless the specified dower is less than the *mahr-ul-misl* (dower customary in her family), in which case she would get the specified dower.[2]

When the term marriage (*nikâh*) is used, it is not necessary that the parties should have a knowledge of the legal effects of the contract. Nor, when the word "marry" or "marriage" is used, is it necessary to go further and enquire into the intention.[3] But where an union is effected by implicative expressions, the parties must intend *marriage*. In the *Durrar-ul-Ahkâm*, however, it is laid down that if the implicative expressions are known to the parties to mean marriage, no further knowledge or intention is required.

The *declaration* and *acceptance*, or, in other words, proposal and consent, may be expressed in any language known to the parties.[4]

Sunni Law.

Under the Sunni Law it is required that the declaration should precede the acceptance, in order to demonstrate conclusively the intention of the parties.[5]

Shiah Law.

Under the Shiah Law, however, it is not necessary that the declaration should precede the acceptance.[6]

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[1] *Radd-ul-Muhtâr*, Vol. I, p. 440.

[2] *Ibid*, p. 441.

[3] *Ibid*, Vol. II, p. 438.

[4] *Mafâtîh; Fatâwa Alamgiri*, Vol. I, p. 382.

[5] See *Fatâwa Alamgiri*, Vol. I, p. 382; *Fatâwa Kâzi Khân*, Vol. I, p. 379; *Fusûl Imâdiya*.

[6] *Jâmaa-ush-Shittât; Sharâya*, p. 262.

Marriage may be contracted by signs in the case of the dumb.

As marriage is contracted by speech, so also it may be contracted in the case of the dumb by signs, when the signs convey their meaning intelligibly.[1]

According to all the schools the bridegroom is entitled to see his wife before the marriage,[2] but Eastern customs very rarely allow the exercise of this right, and the husband, generally speaking, sees his wife for the first time when leading her to the nuptial chamber. In order to obviate the drawbacks which naturally spring from the restrictions imposed by Oriental manners on social intercourse between the two sexes, custom has devised the institution of *mushâttas*, who serve as intermediaries and help in bringing together the families of the future bride and bridegroom. These *mushâttas* arrange the visits of the members of the two families to each other, settle the outlines of the marriage settlement and the *paraphernal* accessories, discover the fortune and means of the parties, and act generally as agents on behalf of the people interested in the arrangement.

Section IV.

Consent.

Consent.

No contract can be said to be complete unless the contracting parties understand its nature and mutually consent to it. A contract of marriage also implies mutual consent; and when the parties see one another, and of their own accord agree to bind themselves, both having the capacity to do so, there is no doubt as to the validity of the marriage. Owing, however, to the privacy in which Eastern women generally live, and the difficulties under which they labour in the exercise of their own choice in matrimonial matters, the Mahommedan Law, with somewhat wearying particularity, lays down the principles by which they may not only protect themselves from the cupidity of their natural guardians, but may, also, have a certain scope in the selection of their husbands.

For example, when a marriage is contracted on behalf of an *adult* person of either sex, it is an essential condition to its validity

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[1] *Jâmaa-ush-Shittât; Sharâya*. p. 262.

[2] *Durr-ul-Mukhtâr*, p. 196; Perron, *Femmes Arabes*, pp. 525—530.

that such person should consent thereto; or, in other words, marriage contracted without his or her authority or consent is null, by whomsoever it may have been entered into.[1]

Among the Hanafîs and the Shiahs, the capacity of a woman who is adult and sane to contract herself in marriage is absolute.

The Shiah Law is most explicit on this point. It expressly declares, that in the marriage "of a discreet female, (*rashîda*, who is adult,) no guardian is required." The *Hedâya* holds the same opinion: "A woman," it says, "who is adult and of *sound mind*, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians, and this, whether she be a virgin or *saïbbah*."[2] Shiah Law. Hanafî Law.

Among the Shâfeïs and the Mâlikîs, although the consent of the *adult virgin* is as essential to the validity of a contract of marriage entered into on her behalf, as among the Hanafîs and the Shiahs, she cannot contract herself in marriage without the intervention of a *walî*. Shâfeï and Mâlikî Law.

Among the Shâfeïs, a woman cannot personally *consent* to the marriage. The presence of the *walî* or guardian is essentially necessary to give validity to the contract. The *walî's* intervention is required by the Shâfeïs and the Mâlikîs to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of similar import, and to guard the girl from being victimised by an unscrupulous adventurer, or from marrying a person morally or socially unfitted for her.

It is owing to the importance and multifariousness of the duties with which a *walî* is charged, that the Sunni Law is particular in ascertaining the order in which the right of *wilâyèt* is possessed by the different individuals who may be entitled to it.

The schools are not in accord with reference to the order. A *walî* must be major, sane and free. He must not be a minor or a lunatic, with or without lucid intervals. Nor can a *wasî*, under the Hanafî Law, act as a *walî* unless he comes within the category of *walîs* pointed out in the law.[3] *Walis*—Hanafî doctrines.

[1] *Fatâwa Alamgiri*, Vol. I, p. 405; *Futâwa Kâzi Khân*, Vol. I, p. 481; *Sharâya*, pp. 262, 263.

[2] *Hedâya*, Bk. I (Eng. Trans.), p. 95.

[3] *Radd-ul-Muhtâr*, Vol. II, p. 486.

If a father who is not "just," or who is addicted to evil ways were to marry his infant daughter to her *manifest* disadvantage, or to a *ghair kufu*, to one unequal to her, such marriage will not be operative or valid.[1]

A *walî*, who is a *fâsik-ul-mutahattak*, that is, addicted to evil ways and extravagance, is not entitled to the *wilâyèt-ul-ijbâr* (the *patria potestas*).

A woman, who is sane, free and adult, can marry herself in *kufu* or not, with or without the consent of any person who might be her *walî*. This is the *mazhab* of Abû Hanîfa, Abû Yusuf and Mohammed, the general principle being that any one who has the capacity to deal with his or her property can also deal with his or her person.[2]

Shâfeï and Mâlikî doctrines.

"Shâfeï and Mâlik hold a contrary opinion," says the *Radd-ul-Muhtâr*, "but there is no authentic *hadîs* in support of their views."[3] At the same time, it is recommended, as more consistent with decorum, that an adult virgin should entrust the negociations of her marriage to a *walî* in whom she trusts.

The *asabâh-bè-nafsihi* have the *wilâyèt*, provided the individual claiming the right is free, possesses the capacity and is a Moslem.

Hanafî Law.

The Hanafîs entrust the office first to the *asabâh-bè-nafsihi* (the *asabâh proprio jure*) in the order of succession, *viz.*, the son, then the son's son, then the father, then the father's father, then the full brother, then the consanguine brother, then the full brother's son, then the consanguine brother's son, then the full paternal uncle, then the consanguine paternal uncle, and then their sons, and so on. When there are no *asabâh-bè-nafsihi*, the *wilâyèt* devolves on the mother, then on the grandmother (father's mother), then on the daughter, son's daughter, daughter's daughter, and so on; then on the maternal grandfather (*iadd-ul-fâsid*), then on the sister, then on the half-sister, then on the uterine relations, then on the *mowla-ul-mawâlât*. For example, suppose a man of the name of Khâlid, is converted to Islâm by one Zaid, a *majhûl-un-nasab*, who has no known relations; and Khâlid dies leaving an infant daughter, Zaid would be her *walî*. In the absence of all these, the *wilâyèt* is to the

[1] *Radd-ul-Muhtâr*, Vol. II, p. 486 [2] *Ibid.*
[3] *Ibid.*

Sultan and then to the Kâzi, if he is vested with the jurisdiction by his *sanad* or commission.[1]

When a minor girl, who has no relation that can stand in the situation of a *walî*, contracts herself in marriage, and there is no Kâzi from whom sanction may be obtained, this marriage is not void, but will take effect on her attaining majority and ratifying the contract.[2] This relates to a case where the marriage is with one who is *suitable* or is the *girl's equal* (*kufu*) and on a proper dower. But when the dower is small, and the man is not her equal, the marriage is wholly ineffective *ab initio*.[3] Also, when a girl has been married without the intervention of a *walî* or the sanction of a Kâzi in the country of the enemy (the *Dâr-ul-Harb*), or on the sea, or when travelling in the desert and such like places, the marriage is null. But if the marriage is contracted in a village or a city it remains subject to her option.[4]

Marriage by a minor girl where there is no *walî* or Kâzi.

If two *walîs* standing in the same degree, like two brothers or two paternal uncles, were to marry a minor girl to two different individuals, the first marriage in order of time will take effect; but if they are contemporaneous, or if it cannot be ascertained which is prior in time, both will be void.[5] Or, the girl may, on attaining puberty, declare that one is the first, which will then be operative.

Marriage contracted by two *walîs* standing in the same degrees of equality.

If the girl is adult, and the *walîs* have married her to two different persons without taking her specific permission as to the particular individual whom they were going to marry her to, the marriages so contracted will remain dependant on her ratification; whichever she ratifies will take effect.

But if she ratifies both, both will be null and void.[6]

The executor (*wasî*) of the father has no right, in his character of executor, to impose the status of marriage on the infant children of the testator, even though the father may have given him the power in his will. In the *Khânièh*, however, it is stated that Hishâm

The executor cannot contract a minor in marriage.

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[1] *Radd-ul-Muhtâr*, Vol. II. p 512.

In the *Radd-ul-Muhtâr* it is stated that according to Abû Hanîfa and Abû Yusuf, the son takes precedence over the father, but in the *Hindièh* (*Fatâwa Alamgiri*) it is laid down that it is proper that the father should have precedence Mohammad differs from the Imâm Abû Yusuf. See the *Radd-ul-Muhtâr*, p. 510.

[2] *Radd-ul-Muhtâr*, Vol. II, p 515. [3] *Ibid.* [4] *Ibid.*

[5] *Ibid.* [6] *Ibid*, p. 490.

has reported in his work, called the *Nawâdir*, an opinion of Abû Hanîfa to the effect, that if the father had made a *wasiat* (testamentary direction) in his will, then the executor would have the power. And Zailye has adopted this view, but this report (from Abû Hanîfa) is weak. And in the *Fath-ul-Kadîr* this matter is explained; it is there laid down that, if the father had in his lifetime fixed upon a bridegroom and distinctly mentioned him in his will, the executor may marry after his death his daughter to the bridegroom so chosen. But this view, again, is combated in the *Bahr-ur-Râik*, which lays down that the executor can marry the girl to the boy in the lifetime of the testator as his *wakîl* or agent, and not after his death as his executor. The author of the *Radd-ul-Muhtâr* then winds up by saying that, if the executor be a *walî de jure*, he can contract the minors in marriage, otherwise not. If there are no natural *walîs*, he must do it with the sanction of the Kâzi.[1]

The Kâzi. But the Kâzi cannot marry a minor girl to his own son or any other relative whose evidence would not, under the Mussulman Law, be admissible against himself. Nor can he marry her himself. And so is the case with the Sultan himself.[2]

Ibn Nujaim has declared judicially that, when the Kâzi has given his sanction to the marriage of a minor, there can be no further dispute, and no outsider can again question it. And similar *Fatwas* are to be found in the *Anfaa-ul-Wasâil*.

It is laid down in the *Khânièh* (*Fatâwa Kâzi Khân*), that if a minor (boy) married a girl who had attained her puberty and then disappeared, and the girl during his disappearance intermarried with somebody else, such second marriage would be lawful even though the boy may choose to ratify the contract entered into by him or on his behalf during his minority, provided the second marriage is contracted before he has signified his ratification.[3]

In the *Fath-ul-Kadîr*, it is laid down that when the father of an adult girl has married her to A with her permission, and the girl contracts herself in marriage with B, in such a case whichever marriage is *declared by her* to be prior in time will be lawful. . . .

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 514.

[2] *Ibid.*

[3] *Ibid*, p. 515. See also the case of *Badal Surat* v. *The Queen-Empress*, I. L., 19 Cal., p 79.

but if the woman says she does not know which one is prior in time and which subsequent, both marriages will be annulled.[1]

It is lawful for a remote *walî* to contract a girl in marriage when the nearer is absent. When the father is absent, and the paternal uncle and paternal grandfather are present, the *wilâyèt* belongs to the grandfather.

When the *nearer walî* (*walî-ul-akrab*) is present, but labouring under a disability, *e.g.*, is a minor or a lunatic, the marriage by the more remote will be lawful.

If the more remote marries a girl or a boy when the nearer is present, the marriage is dependant upon the latter's ratification, which ratification must be distinct. Mere silence is not sufficient.[2]

As regards the distance, which would justify a remote *walî* marrying a minor in the absence of the nearer *walî*, the author of the *Tanwîr-ul-Absâr*, following the *Kanz-ud-Dakâik*, has held it to be three days' and nights' journey, and this is called a *ghibat-ul-munkataa.*[3]

Ghibat-ul-munkataa.

In the *Multeka* it is stated, that when a suitable match is arranged for a boy or a girl with a bride or bridegroom of equal position, and the nearer *walî* of the former is at such a distance that his approval cannot be obtained without the risk of the match falling through owing to delay, such a distance would be a *ghibat-ul-munkataa.* Ibn-Kamâl has given *Fatwas* in accordance with this doctrine. And in the *Bahr-ur-Râik* it is stated from the *Mabsût* that this principle is correct. In the *Nihâya* it is laid down that all the jurists have adopted this view, and in the *Fath-ul-Kadîr* it is mentioned that there is no difference on this point.[4]

Even where the *walî-ul-akrab* is concealed in the city where the parties are residing, but it cannot be ascertained where he is, nor his sanction obtained, if the *kufu*[5] will not wait for his appearance, a marriage contracted by the remoter guardian would be lawful according to the *Multeka.*

Marriage by a walî in a distant country.

If the absent *walî-ul-akrab* marries the minor at the place where he himself happens to be, the marriage will not be valid according to the *Nahr-ul-Fâik*, the *Muhît* and the *Mabsût.*

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 516.

[2] *Ibid*, p 516.

[3] *Radd-ul-Muhtâr*, Vol. II, p. 516.

[4] *Ibid*, p. 516.

[5] The *equal in match* to the bride or bridegroom.

If a *walî* refuses to marry, it is an act of oppression; then the sovereign or his representative, the Kâzi, would marry the minor.[1] But not when the *walî* is absent, especially on *Hajj*.

If the *wali-ul-akrab* altogether prohibits the marriage, then the Kâzi would authorise the next guardian to contract a marriage for the minor.

And if a marriage has been contracted by a remoter guardian in the absence of the nearer, it will not be annulled when the latter returns, but will remain valid.

An acknowledgment of marriage between minors by their *walî*, or *walîs* is not effective and will be set aside if, on attaining majority, they should deny the same. But if the *walî* should make the acknowledgment during their minority, and they should not say anything on coming to know of it after attaining majority, the acknowledgment would be valid.

Shâfeï doctrines.

The Shâfeïs adopt the following order: the father, the father's father, the son (by a previous marriage), the full brother, the consanguineous brother, the nephew, the uncle, the cousin, the tutor, and lastly, the Kâzi, thus entirely excluding the female relations from the *wilâyèt*.[2]

The Mâlikîs agree with the Shâfeïs in confiding the office of *walî* only to men, but they adopt an order slightly different. They assign the first rank to the sons of the woman (by a former marriage), the second to the father, and then successively to the full brother, nephew, paternal grandfather, paternal uncle, cousin, manumittor, and lastly to the Kâzi.

Among the Mâlikîs and the Shâfeïs, where the presence of the *walî* at a marriage is always necessary, the question has given birth to two different systems.

The first of these considers the *walî* to derive his powers entirely from the law. It, consequently, insists not only on his presence at the marriage, but on his actual participation in giving the consent. According to this view, not only is a marriage contracted through a more distant *walî* invalid, whilst one more nearly connected is present, but the latter cannot validate a marriage contracted at the time without his consent, by according his consent subsequently.

This harsh doctrine, however, does not appear to be enforced in any community following the Mâlikî or Shâfeï tenets.

[1] *Radd-ul-Muhtâr*, Vol. II, p. 517. [2] *Ibid*, p. 518.

The second system is diametrically opposed to the first, and seems to have been enunciated by Shaikh Ziâd as the doctrine taught by Mâlik.

According to this system the right of the *walî*, though no doubt a creation of the law, is exercised only in virtue of the power or special authorisation granted by the woman ; for the woman once emancipated from the *patria potestas* is mistress of her own actions. She is not only entitled to consult her own interests in matrimony, but can appoint whomsoever she chooses to represent her and protect her legitimate interests. If she think the nearer *walî* inimically inclined towards her, she may appoint one more remote to act for her during her marriage. Under this view of the law the *walî* acts as an attorney on behalf of the woman, deriving all his powers from her and acting solely for her benefit.[1]

This doctrine has been adopted by Al-Karkhî, Ibn-al-Kâsim, and Ibn-i-Salamûn, and has been formally enunciated by the Algerian Kâzis in several consecutive judgments.

When the *walî* preferentially entitled to act is absent, and his whereabouts are unknown ; or when he is a prisoner or has been reduced to slavery ; or is absent more than ten days' journey from the place where the woman is residing ; or is insane, or an infant, then the *wilâyèt* passes to the person next in order to him.

The Hanafîs hold that the woman is always entitled to give her consent without the intervention of a *walî*.[2] When a *walî* is employed and found acting on her behalf, he is presumed to derive his power solely from her, so that he cannot act in any circumstance in contravention of his authority or instructions.[3]

When the woman has authorised her *walî* to marry her to a particular individual, or has consented to a marriage proposed to her by a specific person, the *walî* has no power to marry her to another.

Under the Shiah Law, a woman who is "adult and discreet" is herself competent to enter into a contract of marriage. She Shiah Law.

[1] Mohammad Assem, *Traité de Mariage*, Traduction de B. Lasalle, chap. ii.; *Kitâb-ul-Anwâr ; Hedâya*, Vol. I, Bk. ii., chap. ii. "Mâlik and Shâfeï assert," says the *Hedâya*, "that a woman can by no means contract herself in marriage to a man in any circumstance, whether with or without the consent of her guardians (*walî*). Neither is she competent to contract her daughter or slave, nor to act as a matrimonial agent for anyone."

[2] *Fatâwa Alamgiri*, Vol. I, p. 405.

[3] *Fatâwa Kâzi Khân*, Vol. I, p. 380.

requires no representative or intermediary through whom to give her consent. "If her *guardians*,"[1] says the *Sharâya* "refuse to marry her to an equal when desired by her to do so, there is no doubt that she is entitled to contract herself even against their wish."[2]

The Shiahs agree with the Hanafîs in giving to females the power of representing others in matrimonial contracts. "In a contract of marriage full regard is to be paid to the words of a female who is adult and sane, that is, possessed of sound understanding; she is, accordingly, not only qualified to contract herself, but also to act as the agent of another in giving expression either to the declaration or to the consent."[3]

The *Mafâtîh* and the *Jâmaa-ush-Shittât* also declare that "it is not requisite that the parties through whom a contract is entered into, should both be males, since with us (the Shiahs) a contract made through (the agency or intermediation of) a female is valid."

To recapitulate:—Under the Mâlikî and Shâfeï Law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorised *walî*, who would act as her representative. Under the Hanafî and Shiah Law, the woman can consent to her own marriage either with or without a *walî*. "When a girl is adult and discreet, no one has a right to be her guardian, but it is nevertheless becoming and proper for her to authorise her father, or grandfather, to settle the terms of the contract for her. If she have no father or grandfather, it would be well for her to appoint her brother to act on her behalf."[4]

Section V.

Express or Implied Consent.

Consent how given.

The consent may be given either in express terms or by implication. In the case of a girl who has been once married or is aware of the nature of the matrimonial contract,[5] the consent is required to be express. When this is not the case, or, in other words, when the girl is a virgin, the jurists of all the schools hold

[1] *Viz.*, the father and the grandfather, who under the Shiah Law are the *only walî-ul-jâbir*.

[2] *Sharâya*, p. 268. [3] *Ibid*, p. 266. [4] *Jâmaa-ush-Shittât*. [5] *Sayyibah*.

that "smiling, laughing, or remaining silent, must be construed to imply consent."

"When the guardian," says the *Hedâya*, "being the person empowered to engage in the contract, requires the consent of an adult virgin to a marriage, if she smile or remain silent, this is compliance; because the Prophet has said, 'a virgin must be consulted in everything which regards herself; and if she is silent it signifies assent;' and also because her assent is rather to be supposed as she is ashamed to testify her wish, and laughter is a still more certain token of assent than silence; contrary to weeping, which expresses abhorrence. . . . . Some have said that if the laughter be in the nature of jest or derision, it is not compliance."[1]

According to the *Radd-ul-Muhtâr*, if the laughter is in ridicule, then it will not amount to consent; nor will crying aloud be taken as assent. But if the girl merely weeps slightly it may be taken as if she was sorry to leave her relations.

Remaining silent, with a distinct knowledge of the fact, is tantamount to consent. But silence at first, owing to some accidental cause or illness, must not be taken as assent.[2] "When a father consults his daughter before marriage," says the *Fatâwa Alamgiri*, "and says to her, 'I am going to contract you in marriage,' and does not mention the dower or the name of the husband, and she remains silent, silence is not consent in such a case, *and she may afterwards repudiate the marriage.*"[3]

Consent of a woman suffering from a serious illness.

The consent is not valid if given when the woman is suffering from a serious illness likely to endanger life. This point was decided by the superior tribunal of Algiers on the 9th of Nov. 1836.

In that case it appeared that one Al-Taïb married a woman of the name of Zuhra, who was at the time in an advanced stage of consumption. The woman, in fact, died four months after the marriage. Upon a suit by Al-Taïb to establish his rights as husband in respect of the property left by Zuhra, the Majlis-ul-Kazâ of Algiers made a decree in his favour. On appeal, however, the Kâzi's order was reversed, and the marriage was pronounced invalid.

[1] *Hedâya*, p. 97; *Fatâwa Alamgiri*, Vol. I. p. 408.

[2] *Radd-ul-Muhtâr*, Vol. II, p. 489.

[3] *Fatâwa Alamgiri*, Vol. I, p. 406. If an adult virgin is married by any person other than the father, brother, or uncle, her consent is required in express words; *Hedâya*, Vol. I p. 96.

It has been doubted by M. Bourdens Lasalle whether the mere proposal and consent in the presence of witnesses constitute the formal marriage, or whether it ought not to be regarded simply as a betrothal. There can be no doubt that, under the Mahommedan Law, a marriage, according to all the schools, is legally complete when *consent* has been given in response to the proposal.

Betrothal.

The institution of *mangni* or betrothal, though it exists in India, is not legally binding on either side. A marriage engagement which has not been completed by the actual *akd*, and when the *sighèh* has not been pronounced, cannot be enforced.

An action for breach of promise cannot lie, therefore, under the Mahommedan Law. It is only after the *akd* has been performed and the contract actually executed, that a suit can lie on behalf of either of the married parties for restitution of conjugal rights.

If the consent has been obtained from the woman by compulsion, the *nikâh* is not valid; and if she has been compelled to consent to a small dower, the Kâzi must give her full customary dower or else separate the parties.

Marriage to different persons by different *walîs*.

If the *walî* were to marry a girl before obtaining her permission, and on learning of it she were to remain silent, it would amount to ratification. If there be two or more *walîs*, and they were all to contract her in marriage with two different people, and she was to remain silent after hearing of both of them, that is, say neither "yea" or "nay," both marriages will remain dependant on her express ratification. And if she were to assent to both, both will be void. If the marriages were contracted after obtaining permission, the one prior in time would take effect. Silence would be ratification of a marriage when the marriage is subsisting. If the husband were to die before the news has been communicated to the girl, her silence would not amount to consent, and she would not be entitled to inherit from the man, though she will have to observe the *iddat*. This is in a case in which the marriage was contracted without her previous permission or consent. But if her consent was taken before the marriage, she would be entitled to inherit.[1]

If an adult girl is married to a man by her *walî*, and on being informed of it, she says she would prefer anybody else, this is tantamount to repudiation.

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[1] *Radd-ul-Muhtâr*, Vol. I, p. 490.

If the paternal uncle's son were to marry an adult girl, her silence is tantamount to refusal.[1]

This applies to a case where it is done without her previous assent. But if the marriage is contracted with her assent, it is valid by consensus.[2]

So long as the adult woman knows the specific individual to whom she has been married or is going to be married, her silence is tantamount to consent.

When consent or permission is sought for by a person who is not a *walî-ul-akrab*, her silence is not consent. Express assent is necessary in such a case as in the case of a girl who has already once been married. Express assent when required.

Various other acts amount to assent, such as removing her furniture to her husband's house and so on. But mere acceptance of his presents is no evidence of assent.

A girl who has accidentally injured herself by jumping or riding or otherwise, is a virgin under the law. So also a woman who has been separated from her husband on the ground of his impotency, or has become divorced by his death before consummation.

A girl who has lost her virginity by fornication is also a virgin in law, provided her fornication has not formed the subject of discussion, and she has not been punished therefor. In short, a virgin in fact and one in law (*hukmi*) stand on the same footing.

In the matter of denial of assent, the woman's statement is to be accepted as against that of her *walîs*.[3]

If the father of a girl were to marry her to a person on the supposition that she was a minor (under puberty), and the girl were to assert that she had attained puberty, and that consequently her *nikâh* was not "correct"; and the father and husband were to assert that she was under puberty, her statement should be accepted, if the girl be nine years of age or over.[4]

Similarly, if a boy, whose property is sold by his father, were to say that he was adult, and that his father had no right to deal with his property, the boy's assertion would be accepted and the sale would be annulled.[5]

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 491.
[2] *Ibid*, p 496.
[3] *Ibid.*
[4] *Ibid*, p. 497.
[5] *Tatar-Khâniah.*

When assent need not be express.

But when two adult persons enter into a contract of marriage themselves, acceptance need not be express. If a man were to call a woman in the presence of witnesses, "my wife," and she answered, "Yes, my husband," it will amount to a valid marriage.[1]

The *Bazâzia*, quoting the *Badâia*, states that assent implied by mere conduct is sufficient. For example, if a man were to propose marriage to a woman on a dower of 1,000 dirhems, and the woman says nothing, but merely accepts the dower, according to the *Bazâzia* this would amount to a valid assent. But the author of the *Muhît* dissents from this view.

When assent should be given.

When the parties are present the assent must follow immediately upon the proposal. If the woman or woman's proxy takes time to consider the proposal, the assent is not regarded as effective. But when a bare proposal is made, and the bride's father were to ask for how much dower, and, upon receiving the answer, were to say, "Yes, I marry my daughter to thee," the marriage would be valid.

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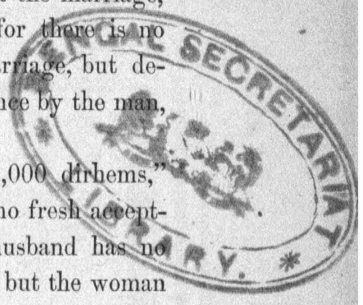
[1] Compare the following remarks of Mr. Bishop on the subject of marriage. "Lord Stowell says, in terms the general correctness of which cannot be doubted, that 'a marriage is not every casual commerce; nor would it be so even in the law of nature. A mere carnal commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,—that, in a state of nature, would be a marriage, and, in the absence of all civil and religious institution, might safely be presumed to be, as it is popularly called, a *marriage in the sight of God*.' And perhaps we cannot object to a decision which holds—that a written instrument between a man and a woman by which they mutually promise to live together as husband and wife *as long as they can agree*, does not constitute marriage; at least, the question should be, whether the parties did take each other as, *in substance*, husband and wife, and did so live. Yet a mere understanding that they might divorce each other at pleasure, whether the understanding was written or verbal, should certainly not be construed to prevent the status of matrimony from attaching to them. Of course, an agreement of this sort between the parties would be void; but not unfrequently the Courts hold to be void some contract entered into at the time of marriage, while the sufficiency of the marriage itself is not denied.

The consent essential to marriage must contemplate a present assumption of the status, in distinction from a mere future union. The agreement of future marriage is termed espousals *de futuro*, or a contract *per verba de futuro*, while the agreement which superinduces the status is termed espousals *de præsenti*, or a contract *per verba de præsenti*."

When a proposal is made in writing the assent may be given on receipt of the writing or afterwards.

When a man makes a proposal in these terms: "I marry you on 1,000 dirhems," and the woman answers, "I accept the marriage, but not the dower," it is not a valid contract, for there is no reciprocity. But she may say, "I accept the marriage, but demand a dower of 2,000 dirhems," which, on acceptance by the man, would complete the marriage.



But if a man were to say, "I marry thee for 1,000 dirhems," and the woman were to say, "I consent for 500," no fresh acceptance on the husband's part is necessary. The husband has no right to reduce the dower, he can only increase it; but the woman may take less if she likes.

"Among the conditions of proposal and consent are that the marriage should not be dependant on a contingency, or suspensive on the happening of a future event, and the woman must not be unknown."

"If a man were to say, 'I shall marry thee three weeks hence' or 'on Zaid's coming,' or if a woman were to say, 'I shall consent three weeks hence,' or 'when Zaid arrives,' there is no marriage." But if assented to, the proposal and assent will amount to a promise of marriage and if consummated will take effect as a valid marriage.

Proposal in writing.

The *Radd-ul-Muhtâr* says the substance of the letter should be read to the witnesses, and so also the consent when given by letter. But when a proposal is made by letter, and the answer is merely—'I accept,' the *Bahr-ur-Râik* thinks it is not sufficient, for it is difficult to apprehend whether the acceptance refers to the proposal of marriage. But if the assent is worded thus, 'I accept thee for or as my husband,' or 'I accept thy proposal of marriage,' &c., it would be sufficient.

In the *Fath-ul-Kadîr*, it is stated that when a woman receives the letter, she should read it out to the witnesses or explain its purport to them; and that she should say, "I accept his proposal," or "I marry myself to him." All this will constitute a valid marriage.

But when a proposal is couched in these terms "marry me to thyself," in such a case it is not necessary for the woman to read the letter to the witnesses, for the man has made her his proxy. It is enough for her to say, "I marry myself to so-and-so."

It is also a condition that the contracting parties or their proxies should hear each other's words, or see the proposal and acceptance in writing.

Section VI.

Testimony.

Shiah doctrines. Sunni Rule.

Under the Shiah Law, the validity of a marriage does not depend on the presence of witnesses, whilst under the Sunni Law it is a necessary condition.[1] Not only must they be present at the time of the execution of the contract, but they must know of its actual terms. They must also be able to speak to the identity of the persons from whom the proposal and consent respectively emanated. If a woman were so concealed or veiled that neither of the witnesses could recognise her, and were not able to tell whether she or any other female in the room gave the consent, their testimony would be insufficient.

The time when the presence of the witnesses is required, is when the contract is being actually entered into, *viz.*, when the proposal is made and the consent is given. And it is insisted upon that both the witnesses should hear the words of both the contracting parties simultaneously. So that if one witness was to hear the words of one and not of the *other* the contract would be invalid.[2] Similarly, it is laid down in the *Radd-ul-Muhtâr*:— "The witnesses should be two free men or one free man and two free women, that they should be sane and adult and *hear the words of the contracting parties together.*" "This is the correct doctrine."[3] "Nor can a marriage be validly contracted in the presence of two persons who are asleep or who are dumb. And this is the opinion of the generality of 'our' doctors. What Zailye has stated, that it is valid in the presence of two sleeping persons and not in the presence of two dumb people has been contradicted in the *Fath-ul-Kadir* and the *Bahr-ur-Râik.*"

"It is further a condition of marriage," says the *Fatâwa Alamgiri*, "that the witnesses should hear together the words of both the contracting parties. Hence, it cannot be contracted in the presence

[1] *Radd-ul-Muhtâr*, Vol. II, p. 444.

[2] *Fatâwa Alamgiri*, Vol. I, p. 379.

[3] *Radd-ul-Muhtâr*, Vol. II, p. 446.

of two sleepers who have not heard the words of both the contracting parties, nor of two persons so deaf that they cannot hear: but the objection does not extend to a person who is dumb or tongue-tied, if he can hear. If the witnesses should hear the speech of one of the parties, and not that of the other, or if one of the witnesses should hear the speech of one of the parties, and the other that of the other, the marriage is not valid. So also, if both the witnesses should hear both the parties, but hear them separately, as for instance, if the marriage should first take place in the presence of one of the witnesses, and should then be repeated in the presence of the other, who was absent on the first occasion, it would not be valid,[1] and if it should take place in the presence of two men, one of whom is partially deaf, and if the hearing witness should hear, but not the one who is partially deaf, and the former, or a third party, should then call aloud the words in the ear of the latter, the marriage would not be lawful until they both hear the contracting parties at once.

"If two persons hear the words of the contracting parties, but do not understand their meaning, it has been said that the contract is valid, but apparently it should be the contrary, and Imâm Mohammed is reported to have held, that when a marriage is contracted in the presence of Turks or Hindus, [who do not understand Arabic], yet if they can explain what they heard, in other words, if they could understand the nature of the ceremony, the contract is lawful, but otherwise not so. In some of the *Fatâwa* it is laid down, that regard is to be had to hearing without comprehending, so that if one should marry with *Ajmîs*, (foreigners,) for witnesses, the contract would be lawful, if they understood the contract to mean marriage, *and this is correct.* But though the witnesses were drunk, and had no recollection of the transaction when they became sober, yet, if they apprehended the matter at the time, marriage is contracted. In the *Fatâwa* of Abû Lais it is stated that if a man should address several persons, saying, 'Bear witness that I have married the woman who is in this house,' and the woman should answer, 'I have accepted,' and the witnesses should hear her speech without seeing her person, and she were alone in the house, the marriage would be lawful; but not so if there was another woman in the

[1] *Futâwa Alamgiri*, Vol. I, p. 378.

house with her at the same time. A person marries his daughter to a man in a house, and there are several persons in another house who hear the transaction, but are not called upon to bear witness to it, yet if there be an opening between the houses through which the persons can see the father, their testimony will be accepted, but otherwise not.

"If a man and woman were to acknowledge a marriage in the presence of witnesses, saying in the Persian language, 'we are wife and husband,' no marriage would thereby be contracted between them, and this is approved. And if he should say, 'This is my wife,' in the presence of witnesses, and she should say, 'This is my husband,' there never having been any marriage between them, the correct view, notwithstanding some difference of opinion upon the subject, is that this would be no marriage[1]—unless judicially pronounced to be a marriage, or unless the parties were to say 'Yes,' in answer to the question of the witnesses 'Have you made this marriage?' when according to the approved doctrine, as stated in the *Sharh-ul-Jussas*, it would be tantamount to a marriage."

It must be borne in mind, however, that these statements refer to the contemporaneous acknowledgment of a marriage and not to the acknowledgment of a marriage previously contracted.

Other examples are given in the law books of expressions by which marriage may or may not be contracted. For example, if a man were to say to a woman, '*Salâm uleki* (peace be to thee), O my wife,' and she were to answer, 'and to thee *Salâm*, O my husband' or if a woman were to say to a man, 'I have married myself to thee,' intending to add 'for a hundred dinars,' but before she can utter the latter words, he answers, 'I have accepted;' "in these cases," says the *Fatâwa Alamgiri*, "according to Imâm Ali as-Sughdi, there is no marriage. If a man were to send some people to another to solicit the hand of his daughter and they were to say in Persian, 'Hast thou given thy daughter to us?' and he answers, 'I have given,' whereupon they reply, 'we have accepted;' this is no contract of marriage for want of reference to the suitor."

The condition of testimony, however, is not so essential that it cannot be dispensed with, and should a marriage be contracted when the Sunni condition of testimony could not be complied with, it

[1] *Sharh-ul-Vikâyah*, p. 106.

would not be invalid. It is only when testimony is available and marriage is contracted without it that the contract is held to be invalid. But even then the defect is cured by consummation.

Capacity of witnesses.

"There are four conditions requisite to the competency of witnesses, *viz.*, freedom, sanity, majority and Islâm."[1] But when a Moslem contracts a marriage with a non-Moslemah, it may be contracted in the presence of two non-Moslems, belonging to her faith or any other faith, provided they do not labour under any legal disability.[2]

In marriage, under the Sunni Law, it is not necessary that the witnesses should bear an irreproachable character. The testimony, accordingly, of persons who have been accused of any crime or who have suffered punishment for delicts, such as slander, adultery, or fornication, is admissible. The deaf are not competent witnesses as they are incapable of hearing the words of either party. The Hanafîs admit the testimony of the blind.[3]

If the woman is present before the witnesses, even though they may not see her face owing to her being veiled, yet if she is pointed out to them as the person assenting to the marriage, it is valid.

But if she be in a room where there are other women at the same time, and the witnesses are unable to see or identify her, it is not valid for fear of mistake. It would not be right for the witnesses to testify to the marriage, under such circumstances, if the woman were to deny the marriage.

The case, however, is different when the woman is known to be by herself in the room and there is no fear of any mistake.

If the witnesses know the woman, it is enough for her proxy, or for any one who is acting for her in contracting the marriage, to mention only her name. But when she is not known to the witnesses, even then, according to Khassâf and Kâzi Khân, the mere

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[1] *Fatâwa Alamgiri*, Vol. I, p. 377. This exclusiveness is not confined to Mussulmans. Lord Coke declared that an "infidel" was not a competent witness, on the ground that "all infidels were in law perpetual enemies, for between them, as with the devil whose subjects they are, there is perpetual hostility and can be no peace."

[2] *Fatâwa Alamgiri*, Vol. I, p. 377; *Fatâwa Kâzi Khân*, Vol. I, p. 380. *Radd-ul-Muhtâr*, Vol. II. p 448.

ويجوز نكاح المسلم الذمية بشهادة الذميين

[3] *Fatâwa Kazi Khân*, Vol. I, p. 380; *Fatâwa Alamgiri*, Vol. I, p. 377; *Radd-ul-Muhtâr*, Vol. II p. 447.

mention of her name is sufficient. For example, if a man were to say, in the presence of witnesses, "I marry myself to the lady who has appointed me her agent for marrying her"—*Zawajjto min nafsi muwakkalti*, according to them such a declaration would be sufficient.

According to the author of the *Tanwîr-ul-Absâr* such a declaration is not sufficient, and when the woman is not known to the witnesses or is not before them, her name and her father's and grandfather's names must be mentioned in their presence for purposes of identification. "And this is correct and on this is the *Fatwa*." The *Bahr-ur-Râ'ik* also states that the received doctrine is contrary to that of Khassâf. And Imâm Ibn-ul-Fazl has laid down that when the bridegroom is not present, his name and his father's and grandfather's should be mentioned; and, similarly, in the case of the bride.

The author of the *Durr-ul-Mukhtâr* adds that when the bride is known to the witnesses, and they know as a fact that she has consented to the marriage, it is enough to mention her name; but, according to Imâm Ibn-ul-Fazl, even when she is known to the witnesses, her name and her father's and grandfather's should be mentioned.

If a man were to marry a woman taking God and his Prophet as his witnesses, some of the jurists have held that this will not be valid, and Abu'l Kâsim Saffâr has gone so far as to declare it to be *kufr*. Others have said that this is too rigid a view of the question, for the man may have intended to mean that God, who is the Knower of all things, knows that he means marriage, and in invoking the name of the Prophet he may have meant that he was marrying in accordance with the Laws of Islâm. The *Tatâr-Khanièh*, quoting the *Multeka*, says that he will not be considered guilty of *kufr*.[1]

Witnesses should know the names of the parties.

It is not necessary that all the witnesses present at a marriage ceremony should know the bride. It is sufficient when her name is mentioned that two of them should know her, in other words, both of them should know who the particular person is who is contracting the marriage, that she is so-and-so and the daughter of so-and-so. It is not necessary that they should see her face.

[1] *Radd-ul-Muhtâr*, Vol. II, p. 452.

Both witnesses must understand what is said. But suppose a marriage is contracted in Arabic and the witnesses do not understand the Arabic language, in such a case there is a difference of opinion. "And it is most correct that the contract will be operative..... What is required is that by the words used marriage is intended; it is not necessary that they should understand the actual words."[1] "When the proposal of marriage is made by letter, it is necessary that the witnesses should hear the contents of the letter. And this should be done in this way: the woman on receiving the proposal should read out the letter to the witnesses or explain its meaning to them, *e.g.*, that so-and-so asks me in marriage, and then say 'bear ye witness that I have married him.'"[2]

They must understand that a marriage is meant.

Among the Shâfeïs and the Hanafîs, the testimony of two men or of one man and two women is considered sufficient, but no marriage can be celebrated in the presence of females alone.[3] The Mâlikîs insist that all the witnesses should be males.

Although the law requires the presence of two witnesses only, if of the male sex, and the early Caliphs always contracted marriages strictly in accordance with the requirements of the law, it is rare to find among Mussulmans, especially in India, nuptials celebrated so unostentatiously that more than two witnesses are not present.[4]

According to both the Shiahs and the Sunnis, a proposal of marriage may be made by proxy or by letter. But when it is made by letter, it is necessary, under the Sunni Law, that the woman should give her consent in the presence of two witnesses who have seen the letter delivered and are aware of its contents.[5]

In the same way when a proposal is made by proxy, the witnesses should hear the message delivered and the consent given. The proxy, or the messenger, need not be an adult person.[6]

Marriages may be contracted among the Sunnis and the Shiahs

Agency in marriage.

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 447.

[2] *Ibid*, p. 446.

[3] *Hedâya*; *Fatâwa Kazi Khân*, Vol. I, p. 380: *Fatâwa Alamgiri*, Vol. I, p. 378.

[4] The Shiahs whilst holding that a marriage may be contracted in private without witnesses, enjoin the preservation of testimony to avoid disputes—*Jâmaa-ush-Shittât*.

[5] *Fatâwa Alamgiri*, Vol. I, p. 380; *Fatâwa Kâzi Khân*, Vol. I, pp. 381, 382.

[6] *Ibid*.

through the agency of *wakîls*. For their appointment witnesses are not necessary, and their powers are governed by the same rules of law as apply to other contracts. If two persons are appointed to act jointly, neither of them can act independently of the other. Should an agent exceed his authority, a contract entered into by him is not valid until ratified by the principal. It is illegal for an agent to contract the principal (if she be a female) to himself or to any of his own relations, unless empowered to that effect by the woman herself. The same rule applies to a woman who acts as agent for a man. She cannot contract him in marriage to any of her own relations unless specifically authorised. If a marriage agent should act *mala fide* towards his principal, or prejudicially to the interests of such principal, by marrying her to a slave, an eunuch, a lunatic, &c., the marriage is invalid.[1]

An unauthorised person, (*fazûli* فضولي), may enter into a contract of marriage for another, but it is not valid until ratified by the parties concerned.

Under the Shiah Law, every person acting for an adult and discreet girl is a *fazûli*, unless specially authorised by her.[2]

Section VI.

Conditions of Marriage.

Though a promise of marriage[3] has no legal effect under the Mahommedan Law, a stipulation after the marriage has taken place to the effect that it will not be consummated until the lapse of a specified period, is valid in law. Such a stipulation is invariably inserted in contracts of marriage between minors. Conditions of this nature, however, are not needed under the Mahommedan Law, inasmuch as a Mussulman husband is not entitled to the custody of his wife's person until she has attained puberty.[4]

The conditions in a marriage contract may be either legal or illegal. The illegal conditions are those which affect the validity of the marriage and render the contract voidable, unless consum-

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[1] *Fatâwa Kâzi Khân*, Vol. I, p. 382; *Jâmaa-ush-Shittât*.

[2] *Jâmaa-ush-Shittât*.

[3] A promise of marriage made by a Mussulman in England would probably give rise to the same legal consequences as though he were an Englishman.

[4] *In re Khatija Bibi*, 5 Bengal Law Reports, O. C. J., p. 530.

mation takes place. When the marriage has been consummated the condition alone is voided.

The condition which limits the duration of the marriage to a specified time is illegal under the Sunni Law.[1] Such temporary marriages (*nikâh-ul-muwakkat*) were admitted by the pre-Islâmic institutions, and were allowed equally among the Jews and the Arabs at the time the Islâmic laws were promulgated,[2] and instances of such unions were not rare even in Christendom. Three days after the Prophet's entry into Mecca these marriages were forbidden by him as contrary to the Islâmic principles.

"And," says the *Tanwir-ul-Absâr*, "*nikâh-ul-mutâa* and *nikâh-ul-muwakkat* (a temporary marriage) are both void." The comment of the *Radd-ul-Muhtâr* on this passage is as follows:—"In the *Fath-ul-Kadîr* it is stated that the Shaikh-ul-Islâm has thus pointed out the difference between these two marriages, *viz.*, that in the *nikâh-ul-muwakkat*, the words *nikâh* and *tazwîj* are mentioned, whereas in *mutâa* the terms انمتع or استمتع are used ... and also that in the *nikâh-ul-muwakkat* the term is fixed, whereas in *mutâa* the parties may live together so long as they wish to enjoy each other's company and no witnesses are required. And there is no doubt of this that though these (forms of marriage) were allowed at first, they were prohibited afterwards."[3]

Then follows a further definition of the word *mutâa*. "The accepted meaning of *mutâa* is an union between a man and a woman not with the objects which are the objects of marriage, *viz.*, the procreation of children and their rearing up, but a contract for mutual enjoyment which is to cease on the termination of the term fixed, or if there is no term specified, upon the man leaving the woman . . . And in this definition, therefore, a temporary marriage is included in the term *mutâa* . . . In the *Fath-ul-Kadîr*, the proofs for its being prohibited are stated. It was prohibited during the *Hajjat-ul-Widâa* (the Last Pilgrimage of the Prophet[4]), and the prohibition is for ever, and there is no difference on this point among the Imâms and the learned of the various countries, though one section admits the validity of *mutâa*.[5]

[1] *Fatâwa Alamgiri*, Vol. I, p. 398.

[2] Perron, *Femmes Arabes*, p. 171; *Code Rabbinique*, Vol. II, p. 232.

[3] Vol. II, p. 480.

[4] Also called the *Hajjat-ul-Balâgh*; See the *Spirit of Islâm*, p. 214.

[5] A section of the Shiahs.

What has been stated in the *Hedâya* that Mâlîk held it lawful is incorrect."[1]

"Regarding the effect of a *nikâh-ul-muwakkat* (a marriage for a fixed term), the doctrine of Imâm Zuffer is to be preferred, *i.e.*, such a marriage will take effect as a permanent marriage, and the condition as to its being temporary will be invalidated, for a *nikâh-ul-muwakkat* is in effect a *mutâa* and this was abolished, but the meaning of abolition is that it existed before and was afterwards abrogated, and therefore the effect of the abrogation is that it avoids the condition as to the temporary character but upholds the contract itself, as in the case of a *nikâh-ush-shighâr*. A *nikâh-ush-shighâr* is a marriage in which two women are married by one contract, the cohabitation of one being the dower of the other. In such a case, the marriage of both will be valid and each of them will get their customary dower, *mahr-ul-misl*. But the case is different with a mere contract for cohabitation, in other words, an union contracted with the word *mutâa*."[2]

Any condition which is *dehors* the contract of marriage is void in itself and does not invalidate the contract. For example, if two persons were to marry each other on the condition that they should become separated after a month, the condition would be null and the marriage will take effect as a permanent contract, "but a man who has work to perform at night, like a watchman, may contract to live with his wife in the day."

A conditional marriage invalid.

A conditional marriage is invalid. For example, if a man were to say, "I marry thee if my father will consent," and the bride were to say, "I consent," there would be no contract. So also a marriage to take effect at a future time. In both these cases, *copula* will effectuate a marriage.

But, as already stated, a marriage with an invalid condition is not invalid, the condition being void and the marriage operative, *e.g.*, if a man said, "I marry thee on condition that there shall be no dower or maintenance," and the woman were to consent, the marriage will be valid, and the wife will be entitled to both dower and maintenance.[3]

"If a woman is not within the prohibited degrees, or another

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 480.

[2] *Ibid.* p. 483.

[3] *Ibid*, p. 483.

man's wife or another man's *muattadah*, and a Kâzi were to declare her, upon the evidence of witnesses, to be the wife of so-and-so, she will be lawful to him, although in reality there may have been no marriage between the man and the woman. This is according to Abû Hanîfa, and on this is the *Fatwa*." In other words, a judicial declaration of the status of marriage by a competent tribunal upon legal testimony would establish the relationship of husband and wife, even when the witnesses have deposed falsely; provided the woman is not prohibited to the man for any cause recognised by the law.

Abû Yusuf and Mohammed think that the man, knowing that it is false, should never cohabit with her.

Temporary marriage—Akhbâri doctrines.

The *Akhbâri* section of the Shiahs and also some of the Usûlis admit the validity of temporary marriages (*nikâh-ul-muwakkat* or *mutâa*). Among them the same conditions are necessary for the validity of a temporary as for a *permanent marriage* (*nikâh-uddâim*). There is, however, this difference, that whereas in the case of a permanent marriage, the non-mention of dower does not render the contract itself null and void, in a *mutâa* marriage it has that effect.[1]

As already pointed out, under the Sunni Law, if a temporary marriage has been contracted, and consummation has taken place, the marriage takes effect as a permanent one.[2]

Hanafi Law.

It was customary in pre-Islâmic times for men to arrange to marry their daughters or other female relations reciprocally, "the person of one forming the dower of the other." This form of marriage was called a *nikâh-ush-shigâr*[3] and was prohibited by the Prophet, according to a *hadîs* admitted to be authentic by all the sects. The Shiahs, the Shâfeïs and the Mâlikîs, consider such marriages invalid, unless consummation has taken place, when the condition of dower is held void, and the *mahr-ul-misl* is presumed to be the dower of the woman. The Hanafîs regard this form of marriage as valid, *mahr-ul-misl*[4] being presumed from the outset.[5]

Conditions opposed to public morality.

Conditions opposed to public morality are illegal and void without touching the validity of the marriage. For example, a

[1] *Mafâtîh*, see *post*.

[2] *Radd-ul-Muhtâr*, Vol. II, p. 481.

[3] *Shigâr*, suppression.

[4] See Chapter on *Dower*.

[5] *Radd-ul-Muhtâr*, Vol. II. p. 481.

condition made to the effect that the husband shall have no right to prevent his wife frequenting immoral places is void. If a woman should forego her right to maintenance, or contract that she will not be entitled to any dower, the stipulation is of no effect in law, and is equally void.

The legal conditions are the following, amongst others :—

(*a*) That the husband shall not contract a second marriage during the existence or continuance of the first.[1] In the case of *Poonoo Bibi* v. *Fyez Bâkhsh* there was a condition to that effect, and it was upheld by the High Court of Calcutta.

Some of the *Akhbâri* doctors are of opinion that this condition is not legal. It would, however, appear that even in Persia, where their doctrines are chiefly in force, this condition is frequently imposed.

(*b*) That the husband shall not remove the wife from the conjugal domicil without her consent.

(*c*) That the husband shall not absent himself from the conjugal domicil beyond a certain specified time.

(*d*) That the husband and the wife shall live in a specified place.

(*e*) That a certain portion of the dower shall be paid down at once or within a stated period, and the remainder on the dissolution of the contract by death or divorce.

(*f*) That the husband shall pay the wife a fixed maintenance.

(*g*) That he shall maintain the children of the wife by a former husband.

(*h*) That he shall not prevent her from receiving the visits of her relations whenever she like.

All these conditions being antenuptial agreements, made in consideration of marriage, are valid and enforcible in law.

In order to constitute a legal marriage, it is not absolutely necessary to reduce the terms into writing, or to embody the proposal and consent in a formal document. And in many parts of India, such as Behar, it is customary not to have any writing. Nevertheless, it has always been recommended that the conditions should be

[1] *Radd-ul-Muhtar*, p. 566, *et seq.* Malik Shah (the Seljukian) imposed this condition for the first time on Caliph Mahdi to whom he gave his daughter in marriage; Von Hammer, *Hist. de l'Empire Ottoman*, Vol. III, p. 17; *Tarikh-i-Wassâf*; see the case of *Poonoo Bibi* v. *Fyez Bakhsh*, 15 Bengal Law Reports, App. 5.

entered in a deed of marriage. The Caliphs, notably Hârûn ar-Rashîd,[1] insisted on all Moslems and Zimmis, subjects of the Caliphate, registering their marriages before the Kâzis.

In Algeria, the deed of marriage is required by law to be registered and a copy kept in the Kâzi's *mahkama*.[2]

The deed of marriage is called in India the *Kâbîn nâmah*, and when there is one, it is always placed in the keeping of the woman. The custom of handing the document to the wife or her guardians dates from pre-Islâmic times, and is necessary for the protection of her interests in countries where no copies of marriage-contracts are kept in the public records.

Khilwat-us-Sahîh.

Hanafî doctrines.

As in many cases invalid marriages are rendered valid by consummation, and as the dower does not become due in its entirety until the marriage has been actually or constructively consummated, the question of consummation forms often an important element in the discussion of the status of marriage.

Hanafî and Mâlikî Law.

Under the Hanafî and the Mâlikî Law, a presumption of consummation is raised from the retirement of the husband and the wife into the nuptial chamber, under circumstances which lead to the natural inference of matrimonial intercourse. This is what is called *valid retirement* or *khilwat-us-sahîh*. But when there is some legal, moral, or physical impediment to such intercourse no presumption is raised, and the retirement is not valid.[3] For example, when the parties are observing the obligatory fast of the Ramazân, or either the husband or the wife is suffering from an illness which prevents connubial relationship, or a third ("discreet") person is present in the room though he may be blind, the retirement into the nuptial chamber does not give rise to the presumption of consummation.[4]

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[1] De Sacy, *Chrestomathie Arabe*, p. 22.

[2] The Mahommedan Marriage Registration Act is only optional, see *ante*, p. 282 note.

[3] *Fatâwa Kâzi Khân*, Vol. I, p. 383; *Fatâwa Alamgiri*, Vol. I, p. 429; *Radd-ul-Muhtâr*, Vol. II, p. 554, *et seq.*

[4] In the *Fath-ul-Kadîr* it is suggested that the illness of the wife is to be considered, but the *Radd-ul-Muhtâr* states that illness on either side likely to prevent cohabitation is to be taken into consideration. The author of the

In Western Mussulman countries, *khilwat-us-sahîh* goes by the name of *bina*.[1]

Among the Hanafîs and the Mâlikîs, the *khilwat-us-sahîh* has the same character, and gives birth to the same legal consequences as the Hebrew ceremony of leading a bride to the nuptial bed.[2] It gives completion to the marriage and marks the time when the conjugal rights commence, and assures her entire dower to the wife. "Our masters," says the *Fatâwa Alamgiri*,[3] "have placed the *khilwat-us-sahîh* in the same category as actual consummation in respect of certain of its consequences, but not others. They have done so in the matter of confirmation of dower, the establishment of paternity, the observance of probation (*iddat*), (the wife's) right to maintenance and domicil (or lodgment), and the unlawfulness of marriage with her sister or with four other women besides her, and the observance of the time for repudiation in respect of her. But they have not placed it on the same footing as actual consummation in making a person *muhsan* or a daughter unlawful, or a

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Radd-ul-Muhtâr says that the presence of a dog which bites in the room would prevent the presumption from arising.—*Radd-ul-Muhtâr*, Vol. II, p. 554.

The author of the *Radd-ul-Muhtâr* following the *Bahr-ur-Râik* states that "there are four conditions necessary to make a retirement tantamount to actual *copula*, *viz.*, (1) that the retirement must be real; (2) that there must not be any physical; (3) moral; (4) or legal bar."

Real retirement means that there should be no third person at the place and that the place itself should not be a public one, like a public bath, public road, a mosque, &c. Moral and legal impediments include a woman being in her courses or in her *nifas* (after childbirth) or the parties being on a *hajj* or subject to the rules of *ihrâm*.

Physical impediment includes the malformation of the woman which prevents *copula*. It also includes infancy, on the part of either or both, which prevents conjugal intercourse.

The place, also, must be fitting for retirement. It must not be exposed to public view or public access. An open or unclosed room will not give rise to the presumption.

If the husband does not know his wife it amounts to a legal impediment.

When these impediments are not present retirement is tantamount to actual *copula* for certain purposes, even though the husband may be impotent,

[1] This word, literally, means an edifice, and as the ancient Arabs used to erect a special tent to conduct their newly-married wives into, the retirement of the bride and the bridegroom into the nuptial chamber has come to be called by that name.—De Sacy, *Anthologie Arabe*.

[2] *Code Rabbinique*, Vol. I. p. 167.

[3] *Fatâwa Alamgiri*, Vol. I, p. 131.

divorced woman lawful to her first husband, or for the purpose of revoking repudiation, or for inheritance. And retirement does not come into the place of consummation in impairing virginity ; so that if a man should retire with a virgin, and then repudiate her, she would subsequently marry as a virgin."

Similarly, the *Radd-ul-Muhtâr* states as follows :—

"Valid retirement establishes the *nasab* of the child, entitles the woman to her dower, maintenance and lodgment, makes it incumbent on her to observe the *iddat*, renders her sister unlawful to the man, creates the unlawfulness arising from the *completion of number*, and makes it incumbent on him to observe the time for *talâk* in respect of her. But it does not create *ihsân* (احصان) as actual consummation, that is, if the man were to commit fornication with any other woman he would not be liable to the *hadd* (punishment for adultery), as he would be if he had consummated the marriage with the woman, nor does it render her daughters unlawful to him unless there was actual *copula* or he had touched her with desire ; or, if the woman had been married to another man who had divorced her irrevocably, and she had afterwards contracted a second marriage, mere retirement with the second would not make her lawful to the first man who had divorced her. Nor, does a *talâk* given after a valid retirement entitle the husband to recall the wife as in the case of a consummated marriage. Nor, should a man *talâk* his wife after a valid retirement only, does she become entitled to a share in his inheritance in case of his death before the expiration of her *iddat*. Nor, in the case of a virgin, does retirement alone take her out of the legal position of a virgin."[1]

Shiah and Shafeï doctrines.

Under the Shiah as well as under the Shâfeï Law, no absolute presumption arises from simple retirement, actual consummation alone giving rise to the rights and duties which spring from marriage.

At the same time, if the parties place themselves in such a situation that cohabitation may take place, the mere denial of the husband to the *copula*, should the wife assert conjugal intercourse, will not be sufficient to contradict the wife.

Proof of Marriage.

Marriage may be proved directly or presumptively. Directly, by means of the oral testimony of the witnesses present during

[1] *Radd-ul-Muhtâr*, Vol. II, pp. 554-570.

the marriage, or by documentary evidence in the shape of a deed of marriage.

Statement or conduct of the parties.

Marriage may be proved presumptively by the statement of the parties or their general conduct towards each other. "When a person," says the *Fatâwa Alamgiri*, "has seen a man and woman dwelling in the same house (*bait*) and behaving familiarly towards each other as husband and wife, it is lawful for him to testify that that woman is the man's wife."

According to Kâzi Khân, if a man and woman were to say that a marriage had been celebrated between them at some previous time, though [in reality] there was no marriage between them, such a statement will not amount to a marriage "for that is a mere falsehood." But if a man were to "say this [or that] woman is my wife," and the woman were to say, "this [or that] man is my husband," that would amount to a marriage, the acknowledgment of the two constituting a valid relationship.[1]

Or, "if a man were to say of a child 'this is my child,' and he were to die, and thereupon the mother of the child, being a free woman, were to say 'he was my husband,' she would be his wife, and would be entitled to inherit from him."[2]

A contemporaneous acknowledgment of a child, as a legitimate child, by a man and a woman would have the same effect. For example, it is laid down that "if a man were to say to a free woman, 'this in my son by thee,' or 'this is our son,' and she were to reply, 'yes,' it would amount to an acknowledgment of marriage."[3]

The Legal Effects of Marriage.

Marriage legalises connubial relationship; it imposes on the husband the obligation of paying the antenuptial settlement and of fulfilling all the antenuptial agreements made in consideration of marriage; it establishes on both sides the prohibition of affinity and the rights of inheritance; it obliges the husband to be just towards his wife, to treat her with respect and affection; and exact from her in return obedience and faithfulness to him.[4]

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[1] See the *Radd-ul-Muhtâr*, Vol. II, p. 435.

[2] *Fatâwa Alamgiri*, Vol. I. p. 727. [3] *Ibid.*

[4] Like the English Law, the Sunni Law allows the husband a moderate power of correction over a refractory wife. The Shiah Law absolutely prohibits a husband to touch his wife in anger.—*Jâmaa-i-Abbâsi*; *Nail-ul-Maram*.

CHAPTER VII.

ILLEGAL AND INVALID MARRIAGES—RIGHT OF OBJECTION POSSESSED BY A WALI—RIGHT OF OPTION—CAUSES FOR WHICH MARRIAGE MAY BE CANCELLED—EFFECT OF APOSTASY ON THE STATUS OF MARRIAGE.

SECTION I.

DIFFERENCE BETWEEN ILLEGAL AND INVALID MARRIAGES.

I HAVE already pointed out the difference between the Sunni and the Shiah Law on the subject of *semblable* unions. Under the Hanafi Law this difference is of the greatest importance in consequence of its effect on the legitimacy of the offspring.

"There are two kinds of unlawful intercourse between the sexes," says the *Inâya*, "one that is unlawful in itself [or, in other words, absolutely]; the other that is unlawful for something else [that is, relatively]; the former is *zina*, the latter is not *zina*. When the man has no right in the woman, or having such right, she is perpetually prohibited to him, the intercourse is unlawful in itself; when the prohibition is temporary, the intercourse is unlawful for something else." [1]

"With regard to women who cannot be lawfully joined together, connection with them is not unlawful in itself, but only for a temporary or incidental cause, that is, the man's having a right over both of them at the same time, which may be removed by his repudiating or disposing of one of them, and therefore the connection is not *zina*. Much less should it be so in the case of a marriage with one sister during the *iddat* of another, or of a fifth wife during the *iddat* of a fourth. Again, with regard to persons who are

[1] *Inâya*, Vol. II, p. 496.

prohibited from intermarrying by reason of a difference of religion, though it is unlawful for a Mussulman to have connection with a Magian woman, the connection is not unlawful in itself, for the objection to it may be removed, as already observed, by the change of religion, and the connection is therefore not *zina*. The same reason is applicable to his connection with any other idolatress, and to the marriage of a Moslemah with a man of a different religion from her own, for the objection in both cases is equally removable by a change of religion."[1]

Hanafi doctrines. *Nikâh-ul-bâtil.*

Connections which are illegal are null and void *ab initio* (*bâtil*) and create no civil rights and obligations between the parties. The wife has no right of dower against the husband (*unless the marriage is consummated*), and neither of them is entitled to inherit from the other, in case of the death of either, during the period when the contract is supposed to have existed. The illegality of such unions commences from the date when the contracts are entered into, and the marriage is considered as totally non-existing "in fact as well as in law."

Marriages contracted within the degrees prohibited by the Mussulman Law fall under the head of marriages which are null and void *ab initio;* they carry no civil rights and produce no legal effect, subject to the limitation already stated. "If," says the *Radd-ul-Muhtâr*, "the man cohabits with the woman after his marriage, she will be entitled to her *mahr-ul-misl*, whatever that be, and this is correct. In the *Ziâdât* it is stated that it should not exceed the specified dower, and this is the doctrine of the Disciples. So it is according to the *Tâbiün*."

According to the Imâms Abû Yusuf and Mohammed, whose views are in force, the illegality of the connection is not altered even by the fact that the marriage was contracted in good faith and in ignorance of the causes which rendered the parties unlawful (*harâm*) to each other. If there be any offspring of such a union, it does not acquire, according to the generally accepted Hanafi doctrine, the status of legitimacy,[2] though the woman has to observe the customary probation before she can marry again.

All this, as shown already, is according to Imâm Abû Yusuf and Imâm Mohammed, for, according to Abû Hanîfa, every marriage

[1] *Inâya*, Vol. II, p. 496.

[2] Subject to the rule of *ghurûr*.

which is vitiated for some reason or other, either in consequence of an illegality, or an informality, or some supervenient incapacity, is only invalid, and the children are in every case legitimate.

Invalid marriages.

Marriages, which are not vitiated and rendered illegal by a radical defect of the character above described, stand on a different footing. In such cases, consummation, generally speaking, removes the flaw to the legality of the union. The children conceived and born during the existence of the contract are held to be legitimate. Consequently, all marriages between two persons who are perpetually interdicted to one another by reason of consanguinity, affinity or fosterage are illegal and void; the other unions are merely invalid, for the supervenient objection may be removed. A Magian woman may be rendered lawful by conversion to Islâm or Christianity or Judaism; a *muattadah* of another, by the expiration of her *iddat*;[1] a non-Moslem, by conversion to Islâm. It is only in the first class of unions that the parties are liable to *hadd*, because, if contracted with knowledge of its illegality, it is *zina*. And, says the *Fatâwa Alamgiri*, the period of *nasab* will be computed from the time of *dukhûl* (*copula*) according to Imâm Mohammed and on this is the *Futwa*.[2]

Contemporaneous marriage with two sisters.

Various examples of a *nikâh-ul-fâsid* are given in the *Radd-ul-Muhtâr*. For example, a contemporaneous marriage with two sisters, or a marriage with one sister during the *iddat* of the other; or a marriage with a woman during her *iddat;* a marriage without witnesses; a marriage with a fifth woman, etc., are all classed as invalid marriages.[3]

Marriage of a Moslemah with a non-Moslem.

In the *Muhît* it is stated that if a non-Moslem were to marry a Moslem, it would amount to a *nikâh-ul-fâsid*, and the parties will not be subject to *hadd* (punishment for fornication), though they may be separated; and *nasab* will be established (*i.e.*, the children will be legitimate). So also in the *Bahr-ur-Râik*.[4]

In a *nikâh-ul-fâsid*, either of the parties may set aside the contract before consummation, but after consummation, according to most of the authorities, the separation must be effected in the presence of both.[5]

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[1] *Ashbâh-wan-Nazâir*, p 58.

[2] *Fatâwa Alamgiri*, Vol. I, p. 104.

[3] *Radd-ul-Muhtâr*, Vol. II, p. 574.

[4] *Radd-ul-Muhtâr.*

[5] *Ibid*, p. 575.

Mere abstention on the part of husband to approach the wife is not a sufficient separation ; he must expressly state to the woman that the marriage is set aside.[1]

If the parties do not agree to separate, the Kâzi is authorised to decree separation.

According to the *Ghâit-ul-Bayân*, a woman cannot contract a second marriage after she has been invalidly married until separation has actually taken place. Zailye seems to differ on this point.[2]

In an invalid marriage, *iddat* does not become incumbent by mere retirement into the nuptial chamber, but after actual consummation.[3]

Period of probation in an invalid marriage.

The period of probation runs from the time of separation ; and the woman would be subject only to the *iddat* of *talâk viz.*, three months, and not to the *iddat* of death, which is four months and ten days.[4]

In a *nikâh-ul-fâsid* the woman becomes entitled to her dower if the marriage is consummated. If the specified dower is less than her *mahr-ul-misl*, she gets the same ; if it is in excess, she will receive the customary dower only.

Issue of an invalid marriage legitimate.

As already stated, the issue of an invalid marriage are legitimate. The *nasab* is calculated from the date of *copula* and not from marriage. This is according to Mohammed " with whom is the *Fatwa*," that is, judicial decisions are passed according to him. Whilst Abû Hanîfa and Abû Yusuf have declared that, in the case of an invalid marriage, *nasab* would be calculated from the date of the marriage as in the case of a valid contract.

A child born at six months from consummation and within two years from separation would be legitimate.[5]

If a man were to charge two mandatories (*wakîls*) to marry him to a woman, and they acting independently of each other marry him to two sisters, the contract prior in date will be held valid, whilst the other will be voided without the formality of the Kâzi's judgment, or a regular divorce from the supposed husband. When it is impossible to discover which of the two contracts was first entered into, both marriages would be nullified.[6]

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[1] *Radd-ul-Muhtâr.*
[2] *Ibid.*
[3] *Ibid*, p. 576.
[4] *Radd-ul-Muhtâr.*
[5] *Ibid*, p. 577.
[6] *Fatâwa Alamgiri*, Vol. I, p. 392 ; *Hedâya.*

When two sisters have been married to one man by one and the same contract, both marriages are void, and the women are not entitled to any dower, if separation has taken place before consummation; should the marriages, however, have been consummated, then both the women would be entitled to their customary dowers, in spite of the dissolution of the contracts. If they were married by separate contracts, and it is not known who was married first, each would be entitled to half their dower, if the separation took place before consummation,—but if after, then to their respective dowers in full. When one marriage is consummated and not the other, the one which is consummated will be held valid though posterior in date. Invalid marriage—Hanafi doctrines—(*continued*).

According to the Hanafi doctrines, when two women, one related to the man within the prohibited degrees, and the other not,—are married by the same contract and one dower, the contract with the first is void, but with the second valid, and the entire specified dower belongs to her. According to the Disciples, if the marriage is consummated with both, the prohibited woman will be entitled to a moiety of the dower.[1]

When a girl is married to two men successively, to one by her father and to the other by another guardian, or when two men claim to be married to one woman, then the marriage first in date is alone considered legal and regular, and the other is dissolved without divorce or decree. In case, however, it is impossible to discover which of the two contracts is prior in date, then both marriages are held null and void, and the woman is not entitled to claim any dower or right of inheritance, if the alleged husband or husbands die. Should the second marriage, however, have been consummated, then, on grounds of public morality, it will be considered valid.[2] A girl married to two persons, first marriage valid. Qualifications to the rule.

Should a man contract a marriage with a woman during her *iddat*, or period of probation, with knowledge of the fact that she was observing the *iddat* being the widow or divorcée of another, such marriage would be void. After the expiration of the probationary period, he can, however, enter into a contract of marriage with her *de novo*. Should the marriage be consummated during the *iddat*,

[1] *Radd-ul-Muhtâr*, Vol. II, p. 480.

[2] *Ibid*, p. 485. Some of the Indian Law Courts have decided cases in the teeth of this principle.

the "woman's person would become absolutely prohibited to the man." Any child, however, born of the connection would be regarded as legitimate, and the separated woman would be entitled to her dower.[1] In this there is no difference between the Hanafîs and the Shiahs.

It is a doubtful point in law, whether a man contracting a marriage with a woman in ignorance of her *iddat*[2] would be absolutely forbidden to cohabit with her. Several cases which have been decided in Algeria serve to show, that when a contract has been entered into in good faith, without the parties being aware of the unlawfulness of the act, it is regarded by a liberal interpretation of the Mussulman Law as valid.

Shiah Law. Under the Shiah Law, if a man commit adultery with a married woman knowing that she is married, he cannot marry her after the decease of her husband. Her person is "for ever unlawful to him."[3] Should he marry her in ignorance of the prohibition and there is issue of the union, such issue will be regarded as legitimate.[4]

Marriage with a pregnant woman. A marriage with a woman, who is *enceinte* with a child whose *nasab* is known, is placed in the same category as a marriage contracted during the period of *iddat*. In other words, when it is known by whom she is *enceinte*, and the pregnancy is consequent upon a lawful contract, nobody else can marry her until after her delivery. The illegality of such a marriage is founded on an express direction contained in the Koran, and has frequently been enforced by the Kâzis' Courts in Algeria.

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[1] *Sharâya*, pp. 272, 273; Comp. *Fatâwa Alamgiri*, Vol. I, p. 393; *Kanz-ud-Dakâik*.

[2] The extreme solicitude of the Mussulman Law with respect to the legitimacy of children, and its aversion to bastardise the offspring of lawful or *semblable* unions, has led to the *formulation* of the rule of *iddat*. Every woman separated from her husband, and every widow is required to abstain for a specific period from contracting a fresh union, until it is known with certainty whether she is *enciente* or not. In the case of a widow this period is four months and ten days, whereas, in the case of a woman separated from her husband by divorce, it is only three months. This prohibition guards against confusion of parentage.

[3] *Mafâtîh*.

[4] Comp. the cases in the *Jâmaa-ush-Shittât*.

On the 13th of July 1864, one of the Kâzis of Algiers made the following order[1]:—"One Bakhta bint Yahya was married to Ahmed bin Bayad on the 14th of April 1864, three months after her separation from her first husband, Abdul Kadir. On the 9th of July 1864, she was delivered of a child. This circumstance came to the knowledge of the Kâzi on the 13th of July, who, thereupon, cited Ahmed, the husband, and Yahya, the father of the woman, before him, and learnt from them that the facts were true. He, thereupon, declared the marriage between Ahmed and Bakhta to be dissolved, and their persons to be forbidden to each other."[2]

But where it is not known by whom the woman is *enceinte*, whether she is married or not, in other words, when the pregnancy is consequent upon fornication, the rule is different. "Abû Hanîfa and Mohammed have said," says the *Fatâwa Alamgiri*, "it is lawful for a man to marry a woman pregnant by fornication, though he must refrain from matrimonial intercourse with her till her delivery. Abû Yusuf, however, was of opinion that the marriage is not valid, but the *Fatwa* is in accordance with the opinion of the two others." As it is not permitted to have connection with her, so also it is not permitted to "solicit" her. In the *Majmooa Nawâzil*, it is stated that, "when a man marries a woman with whom he has already had illicit intercourse, and it appears that she is pregnant, the marriage is lawful, and he may cohabit with her, and she is entitled to maintenance according to all their opinions."

The Shiahs are in accord with the Hanafîs on this point.

"When a man is absent from his virgin wife for years, and she marries and has children, or a woman is taken captive and married to an enemy and has children, or a woman claims to be repudiated, keeps *iddat*, marries another husband and has children, or her husband's death is announced to her, and she keeps *iddat*, marries another and has children, the offspring would belong to the second husband, and on this is the *Fatwa*. Kâzi Khân and the author

[1] The Kâzi, as the general conservator of law and morality in a Mussulman community, has the power to annul or punish an illegal act, without a formal complaint being preferred before him. See the *Fatâwa Alamgiri* and the *Jâmaa-ush-Shittât; Kitâb-ul-Kazâ.*

[2] Sautayra, Vol I, p. 142.

of the *Sirâjia* hold the same opinion, and Sadr-ush-Shahîd used to decide in accordance therewith."[1]

Re-marriage with a divorcée according to the Hanafis.

When a man re-marries a woman from whom he has been irrevocably divorced,[2] *without her having been married to another man in the interim and separated from him*, such re-marriage is illegal. Mere marriage would not be sufficient, there must be consummation. This rule was prescribed to arrest the scandal of indefinitely repeated divorces and re-marriages which had become frequent in Arab society, and were opposed to the interests of public morality. The violation of this law, therefore, leads to the nullity of the marriage.[3]

Shiah doctrines.

According to the Shiahs, when a man divorces his wife irrevocably and then marries her again, *talâks* her and again re-marries her and again *talâks* her, he cannot re-marry her without submitting to the ordeal of her being married to another person and being divorced by him. This was prescribed as a punishment for the man's outrageous conduct towards the woman.

Should the separation, however, have taken place under circumstances giving rise to the inference that both parties, at the time of disagreement, had lost all self-control, some lawyers are of opinion an allowance should be made in their favour, and that they should be permitted to re-marry, without the wife having to undergo the disagreeable ordeal of a marriage ceremony with another man.

According to the doctrines of the schools which recognise the lawfulness of polygamy, a man may enter into four contemporaneous contracts of marriage.[4] A contract of marriage with a fifth woman is absolutely void; but if the marriage be consummated, though she would be separated from the man, yet she would be entitled to her *mahr-ul-misl*.[5]

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[1] *Fatâwa Alamgiri.*

[2] See Chapter on *Divorce.*

[3] The scandalous condition of morality in the Arabian Peninsula, among the Jews, the Christians, and the Pagan Arabs, at the time of Mohammed's advent, is apparent from the prohibition pronounced by him against the re-marriage of a woman to a man who had divorced her three times.

[4] See the *Introduction*; Even the *Radd-ul-Muhtâr* states that if a man were to marry a woman, and in order to please her does not marry any other, his act is pious and will be rewarded by God. Comp. *Sharâya*, p. 274.

[5] A section of the Shiahs think that besides four wives permanently married, a man may contract several temporary marriages. The Sunnis very rightly repudiate this doctrine as immoral The Mutazalas agree with the Sunnis.

As already pointed out, the prohibitions, other than those based on consanguinity, affinity or fosterage, render the contract only invalid. Under the Shiah Law every marriage, to which there is an objection even within the prohibited degrees, is *invalid*, if the illegality was not known to the parties or either of them.

Shiah law; no distinction between illegal and invalid marriage.

SECTION II.

INVALID MARRIAGES.

Invalid marriages are those which are not absolutely illegal or void, and are either invalidated by the decree of the Judge or by the action of the parties interested. Consequently, in the case of such marriages, the cause of invalidity may be removed either by the parties themselves or by those who stand in *loco parentis* to them.

Invalid marriages. Hanafi Law.

A marriage contracted by an infant, according to all the schools, is an invalid marriage. When the contract is entered into by a minor possessed of discretion, it is validated by the ratification of the guardian.[1]

Marriage by an infant.

A contract of marriage entered into by an insane person or one who, without being a confirmed lunatic, is labouring under mental hallucinations, is, under the Sunni Law, invalid. Its ratification by the guardian of the *non compos mentis* removes the invalidity.[2]

By an insane person.

Under the Shiah Law the contract has no legal effect and is absolutely void.[3]

Shiah Law.

A marriage contracted by a person whilst in a state of intoxication is invalid, according to the Shiah as well as the Sunni Law, unless confirmed after the recovery of consciousness. The Shiah view is according to the *Mafâtîh*. The *Sharâya*, however, makes a distinction between the case of a male and that of a female. A marriage contracted by a drunken man, according to the *Sharâya*, is not valid, even though he may ratify it on regaining consciousness; whilst in the case of a female it is held to be otherwise. Consequently, a female who has been induced to consent to her marriage whilst in a state of intoxication, can, on becoming

A marriage contracted during intoxication. Hanafi and Shiah doctrines.

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[1] *Fatâwa Alamgiri*, Vol. I p. 377; *Sharâya*, p. 262.

[2] *Ibid*, p 402.

[3] *Sharâya*, p. 262; *Jâmaa-ush-Shattât*; *Fitâh-min-la-Yuhazzar-al-Fakih*.

conscious, ratify the contract and it becomes valid. The opinion of the Allâmah given in the *Mafâtîh* is the more correct and is supported by the cases cited in the *Jâmaa-ush-Shittât*.

Marriage contracted *in extremis*.

A marriage contracted by a person *in extremis* or by one suffering from a disease in which there is imminent danger of death, is invalid. If the disease, however, be such that the person recovers from it, and consummates the marriage, the invalidity is removed. "A marriage contracted by a sick person (مریض) is dependent on consummation," says the *Sharâya*, "so that if he die of *that illness* without consummation, the contract is void and the woman has no right to dower or succession." The *Jâmaa-ush-Shittât* says, "When a contract is entered into by a man suffering from an illness, and he dies of it *after* consummation, or if after recovering from that illness, he dies of some other disease, then the marriage is valid, and the wife is entitled to her dower as well as to her right of succession." Again, when a woman in health marries a sick man and dies before consummation, the majority of the doctors hold that the husband is entitled to the right of succession in her estate, "though there is some difference of opinion." When a woman *in extremis* or suffering from a dangerous illness marries a man in health, who dies without consummating the marriage, the contract is held to be valid, and the wife has a right to her dower and to a share in the inheritance of her deceased husband. Though the references given are from Shiah authorities only, it is needless to add that there is very little difference on these points between the Shiahs and the Sunnis.

Consent obtained by fraud or force.

When consent to a contract of marriage has been obtained by force or fraud, such a marriage is *invalid*,[1] unless ratified after the coercion has ceased, or the duress has been removed, or when the consenting party, being undeceived, has continued the assent.[2]

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[1] *Radd-ul-Muktâr*, p. 443.

[2] From some of the authorities cited in the *Fatâwa Alamgiri* it would appear at first sight that if a woman were compelled to marry, against her will, "a man who was her equal and gave a suitable dower," that she would have no option after the compulsion has been withdrawn. But a careful collation of *all* the authorities and an analysis of the qualifications attached to this doctrine, which in its bare form is no less astounding than contrary to the rational provisions of the Mahommedan Law, leave no room for doubt that the principles given in the text are correct. The Shiah Law is very explicit and admits of no doubt.

Should a person, who has made a proposal or declaration, subsequently lose his consciousness and understanding (though only for a time), his proposal of marriage would, if accepted, be invalid.[1] Shiah Law.

The right of the father under the Mussulman Law to impose the status of marriage on his minor children has been already mentioned. A marriage contracted by the father or the grandfather, who, in the absence of the father, stands in his place, is *primâ facie* supposed to be in the interests of the child. A minor, therefore, contracted in marriage by a father or a grandfather according to the Hanafîs, the Shâfeïs and the generality of the Shiahs (the Mâlikîs and Mutazalas differing), has no right of option on arriving at puberty to ratify or cancel the contract of marriage—unless the marriage was grossly *unequal* or the dower was fraudulently improper, or one of the parties so contracted was suffering from some incurable disease.[2]

Limitations on the power of the father.

But there are important provisoes qualifying the otherwise unlimited and irresponsible power of the father. It is held that a contract of marriage entered into by a father or any person standing in *loco patris*, must not be prejudicial to the interests of the minor. When a father, who is not just or is a *fâsik ul-mutah-hattak*, *i.e.*, extravagant in his habits or immoral in his life, enters into a contract of marriage for his child, it is invalid;[3] so also if it is manifestly to the disadvantage of the child.[4] If the father were to contract his child to an eunuch, a slave, or a leper, or to one suffering from elephantiasis, or any other malady of such a nature as would prevent connubial relationship, the marriage would be invalid, and would be set aside at the motion of any friend of the infant or by the guardian next in degree to the father of the child, or the mother.[5] If the father were to marry the child to one very much beneath him or her in rank or quality, or to one who cannot maintain the wife, such marriage would also be invalid.

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[1] *Sharâya*, p. 262, 263; *Jâmaa-ush-Shittât; Irshâd-ul-Allâmah.*

[2] *Fatâwa Alamgiri*, Vol. I, p. 412; *Radd-ul-Muhtâr; Sharâya*, pp. 263, 264; *Jâmaa-ush-Shittât.*

[3] *Radd-ul-Muhtâr*, Vol. II, p. 483; De Menerville, *Jurisprudence de la Cour d'Alger; Hedâya.*

[4] *Radd-ul-Muhtâr*, Vol. II, p. 484.

[5] *Ibid.*

The *Radd-ul-Muhtâr* is very distinct on this point. "By consensus a contract of marriage entered into by a father or grandfather for a minor child, whilst inebriated, with a man who is either immoral, or wicked, or in want, or who cannot pay her maintenance or dower, or who carries on a low profession, such as that of a scavenger, or cobbler, or weaver, is invalid and unlawful."[1]

There is no provision in the law that an order should be obtained from the Kâzi declaring the invalidity of such a contract. But in a country like India, where there is no uniformity in the administration of justice, and much depends on individual idiosyncracies, it is better to apply for and obtain a declaration from the Civil Court.

As regards such a marriage contracted by any *walî* other than the father or grandfather, there is no question. The *Radd-ul-Muhtâr*, following the *Fath-ul-Kadîr* and the *Ghâit-ul-Bayân*, says, that such a contract entered into by any person other than the father or grandfather is void from the outset, so that it is not necessary for the minor on attaining majority to annul or ratify it, whereas when a marriage of this kind is contracted by the father or grandfather, the minor has an option.[2]

Section III.

Al-Kafat, or Equality in Marriage.

The Arabian Legislator appears to have viewed with much disapprobation ill-assorted marriages. He is said to have declared that women should not be contracted in marriage except to their equals.[3] "Take ye care," said he, "that none contract women in marriage but their proper guardians, and that they be not so contracted except with their equals," "because," adds the *Hedâya*, "cohabitation, society, and friendship cannot be completely enjoyed excepting by persons who are each other's equal (according to the customary estimation of equality), as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite, therefore, that regard be had to equality with respect to the husband, that is, the husband should be the equal of the wife."

[1] *Radd-ul-Muhtâr*, Vol. II, p. 499.

[2] *Ibid*, p. 501.

[3] *Hedâya*, Vol. I. p. 110.

The Hanafîs, accordingly, hold that *equality* between the two parties is a necessary condition in marriage, and that an ill-assorted union is liable to be set aside by a decree of the Judge. Hanafi doctrines.

The Hanafî doctrines regarding equality are founded chiefly on Arab analogies. For example, it is declared that the husband should be the equal of the wife in lineage and rank, should not be a slave, should be a Moslem, should be possessed of sufficient means "to pay the wife's dower and provide for her maintenance," should be virtuous and pious,[1] should be the wife's equal in trade or business.[2] "A profligate is not the equal of a good woman. . . . A person marries his young daughter to a man under the impression that he is virtuous. It afterwards appears that he is a habitual drunkard, and the girl on attaining puberty declares she is not content with the marriage. Under these circumstances, if the father was not aware of his being a drunkard, the marriage is liable to be cancelled."

A woman is not required to fulfil any of these conditions; equality is not necessary in a wife, for a husband can raise her to his own rank, however high.[4] But this refers to the case of an adult, for a man who is *sui juris* can marry any one he likes. But if a father or grandfather were to marry an infant to a low-born girl, such marriage would not be valid.[4]

Equality is insisted upon at the outset, so that if the man was equal to the woman at the time of the marriage, and becomes lowered afterwards either morally or in material circumstances, the marriage cannot be invalidated.

Nor, can a marriage be invalidated on the ground of discovery of inequality on the part of the man, if the *walîs* of an adult girl have entered into a contract of marriage with her express assent, unless at the time of the marriage the *walîs* insisted upon equality and the man gave them the assurance about equality, or they required an assurance from him that he was well-behaved or not given to drinking &c., and he gave that assurance which is found to be untrue. In such cases both the girl and the *walîs* will have the power to have the contract cancelled.[5]

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[1] *Fatâwa Alamgiri*, Vol. II, p. 411.
[2] *Fatâwa Kâzi Khân*, Vol. II, p. 399.
[3] *Radd-ul-Muhtâr*, Vol II, p. 519
[4] *Radd-ul-Muhtâr.*
[5] *Ibid*, Vol. II, p. 521.

This is different from the case of a minor girl. If she is married by a father or grandfather to a person whom they believe either socially or morally to be her equal, and he turns out to be low-born or depraved or addicted to drinking, the right of having the contract cancelled is established in her as well as in her *walîs*.[1]

Under the Hanafî Law there are six requisites to equality :—

(1) *Nasab*, family or descent.
(2) Islâm.
(3) Profession.
(4) Freedom.
(5) Honesty.
(6) Means.

(7) According to the *Fatâwa Hâmidia*, potency—so that if a father married his minor daughter to a person known to be impotent, it will not be valid ; though, according to the *Bahr-ur-Râik*, if the girl is adult the marriage will be lawful (if the man is in other respects her equal), but the woman will have the power to obtain a nullity of the marriage on the ground of impotency.[2]

(1) The Koreish are each others equal, but are superior to all other Arabs ; so that a Koreishite woman is superior to all other Arabs.

Other Arabs are each other's equal, but they are superior to all non-Arabs. Even a non-Arab King is not equal to an Arab woman.[3]

Among Arabs, it is not necessary to look to the profession he follows.[4]

Persons, who trace their descent to the Caliphs, though born and bred in foreign countries, are, in the matter of descent, on the same footing as the domiciled Arabs.[5]

An Alide is superior to all Arabs. So is a learned Ajami (foreigner) the equal of an ignorant Arab or even an Alide. The worth of learning is greater than the worth of family.[6]

Mâlîk gives the preference to all the descendants of the Prophet over every one else ; but the Hanafîs and Shâfeïs will not give

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 519.
[2] *Ibid*, p. 522.
[3] *Ibid*, p. 529.
[4] *Radd-ul-Muhtâr*, Vol. II, p. 523.
[5] *Ibid.*
[6] *Ibid*, p. 536.

any opinion as to who was superior to the other, *viz.*, Ayesha or Fâtima't-az-Zahra.

A Hanafî male is the equal of a Shâfeï female, and a Hanafî may lawfully marry a Shâfeï. So if a Shâfeï adult virgin marries a Hanafî, the marriage would be valid according to the Hanafî Law.[1]

A merchant is superiôr to a tradesman; a Kâzi or *Fakîh* to a merchant.

If the boy has no means but his parents or grandparents have, he must be accounted to have means.[2]

The Mâlikîs and the Shiahs differ materially from the Hanafîs in their estimate of the character of these conditions. According to them, Islâm and an ability to support a wife are the two necessary conditions to constitute a well-assorted marriage.[3] A Moslem possessed of sufficient means to maintain a wife may, among the Mâlikîs and the Shiahs, marry any Moslem woman, without question of lineage or rank; "for are not," it is portinently asked, "all Moslems equals."[4] Mâlikîs and Shiahs.

If an adult woman contracts herself in marriage to one who is not her *equal*, the *walîs* have a right to object.[5]

The question of ability to support a wife has been a fruitful source of discussion among the early lawyers. The *consensus* of opinion seems to be that if the husband possesses means to maintain his wife for one month, besides paying the dower, it is a sufficient "ability" in law.[6]

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 530.

[2] *Ibid*, p. 531.

[3] *Ibid*, p. 519; *Sharâya*, p. 278; *Jâmaa-ush-Shittât*.

[4] According to the Hanafî doctrines, an Arab of *any* tribe but the Koreish is not the equal of a Koreishite woman; a non-Arab is not the equal of an Arabian woman; a slave is not the equal of a free woman. So that all unions between such people are *theoretically* ill-assorted marriages. The marked distinction between the Shiah and Hanafî doctrines on this point, is shown by the *Sharâya*. "It is lawful," says the *Sharâya*, "for a free woman to marry a slave, for an Arabian woman to marry a Persian, or for a woman of the tribe of Hâshim to marry a non-Hashimite and *vice versâ*," p 278. So also the *Mafâtîh*.

[5] *Ibid*. "It is abominable for a woman to marry a profligate, and the abomination is aggravated by his being an habitual drunkard."

[6] *Fatâwa Alamgiri*, Vol. I, p. 411.

It is needless to add here that cases bearing on the points of equality required under the Hanafi Law rarely arise in India, inasmuch as the family of the bride and bridgroom take very great care to ascertain the *nasab* and *hasab* (character) of the parties, and yet contingencies may arise which may lead to serious discussions on the subject of equality.

"Except Islâm and freedom," says the *Fatâwa Alamgiri*, "equality in any other respect is not invariably observed in a country other than Arabia."

It has been already mentioned that the Shiahs and the Hanafîs allow the greatest freedom to women, who are, if *sui juris*, free to contract themselves in marriage. But such freedom is restrained by the power of veto or objection possessed by the guardians in case of a mésalliance.[1] Among the Shiahs this right of veto is almost *nil*, owing to the fact that the conditions of equality, according to their doctrines, have reference only to the Islâm of the husband and his ability to support the wife. If an adult woman of the Shiah school were to marry a non-Moslem, it is probable that her relations would have the same right of objection as relations undoubtedly have under the Sunni Law.

Hanafi Law; Right of veto.

Among the Hanafîs, this right of objection has far greater importance. In the case of the rule laid down for the guidance of the guardians, when entering into a contract of marriage for their wards, the principle and the limits are easily definable. Guardians are directed to have regard to the ages of the parties; not to marry a young girl to a very old man and *vice versâ*; not to allow a marriage to take place between a female belonging to a noble family, and one far beneath her in rank or status,[2] should he not possess some qualification to justify the alliance; and not to marry minor girls on grossly inadequate dowers, &c.

In the case of a mésalliance contracted by an adult woman, the question of *inequality* is fraught with great difficulty. An analysis of the various decisions collected together in the several digests, notably the *Fatâwa Alamgiri*, the *Fatâwa Kâzi Khân* and the

[1] *Fatâwa Kâzi Khân*, Vol. I, pp 401, 468; and *Fatâwa Alamgiri*, Vol. I, p. 412.

[2] It must be added, however, that a man who is "rich in learning" is regarded as "the equal" of the noblest born woman.

Radd-ul-Muhtâr leads to the conclusion that in Mussulman communities, outside the peninsula of Arabia, great disparity in rank, refinement, culture, social position or means, would furnish reasonable and proper grounds for a guardian or *walî* to object to a marriage contracted by a female who is *sui juris*. For instance, if a woman were to contract a run-away marriage with a servant of her family, the marriage would be annulled by the Kâzi on the application of the *walî*. Difference of faith would always justify an objection to a marriage. It is only the *asabâh-bè-nafsihi* who can raise any objection to a marriage contracted by an adult girl on the ground of inequality.[1]

An *ill-assorted* marriage or a mésalliance contracted by a woman remains intact with all its consequences until annulled by the order of the Kâzi.[2] A Judge alone has the power of cancelling marriages on the ground of inequality. The judicial separation affected by the Kâzi is not equivalent, however, to a *talâk*, so that if the marriage has not been consummated, the woman is not entitled to any part of the dower. But if consummation has taken place or there has been a "valid retirement" into the nuptial chamber, then he is liable for the whole dower and for maintenance during the *iddat*.[3]

The delay of a guardian in instituting proceedings to set aside a marriage on the ground of mésalliance does not lead to the forfeiture of his right.[4] "But after the woman has actually borne a child to her husband the guardians have no right to have the marriage cancelled," "for," adds the *Radd-ul-Muhtâr*, "it would damage the interests of the child; so in the *Durrar*."[5]

When the guardian has once, by word or deed, expressly or impliedly, acquiesced in the marriage, he loses absolutely his right of objection; or, when one guardian has consented, none other, except one higher in degree, can object.[6] The *Radd-ul-Muhtâr* says, if

[1] *Radd-ul-Muhtâr*, Vol. II. p. 488.

[2] *Fatâwa Kâzi Khân*, Vol. I, pp. 401—468; *Radd-ul-Muhtâr*, Vol. II, p. 486, 531.

[3] *Fatâwa Alamgiri*, Vol I, p. 412; *Fatâwa Kâzi Khân*, Vol. I, p. 401; *Kanz-ud-Dakaik*.

[4] *Fatâwa Kâzi Khân*, p. 401.

[5] *Fatâwa Alamgiri*, Vol. I, p. 412; *Radd-ul-Muhtâr*, Vol. II, p 487.

[6] The *Fatâwa Alamgiri*, Vol I, p. 412 says that if the *walî* take possession of the dower and provide the *jahâz* (in common parlance, *jahêz*) it amounts to acquiescence.

some of the *walîs* agree it is tantamount to all agreeing, as the *âmân* given by one Moslem to a *harbi* holds good against all Moslems.

The power of objecting belongs exclusively to the *Asâbah* of the woman and not to the uterine relations.[1]

There is no reason why the Civil Courts in British India should not entertain a judicial proceeding or suit by a Hanafî father to set aside, on the ground of inequality, a marriage contracted by an adult daughter.

If either of the married parties should die before the decree of the Judge is issued cancelling the marriage, the survivor would be entitled to a share in the inheritance of the deceased, as in any ordinary case.

Section IV.

The Option of Puberty (*Khyâr-ul-Bulûgh*).[2]

According to the Hanafî Law, there is great distinction between contracts of marriage entered into for minors by the father or grandfather and those entered into by other *walîs*.

If a marriage is contracted by the father or grandfather for his minor children or grandchildren with their *equals* (*kufu*) the children have no option of setting aside the contract on attaining majority. In other words, if the marriage is in all respects suitable, the bride and bridegroom are equally matched in rank, position and age, and there is no deformity or evil habits on one side or the other, the dower is proper and so on, in such a case the minors, on attaining majority have no option ; for it is presumed that all these circumstances combining, the love which a father or grandfather bears to his children or grandchildren must have actuated him in making his choice, which ought not to be set aside at the mere caprice of the young people after they attain the age of puberty.[3]

But when the father or grandfather contracts a minor boy or girl in marriage with a person who is not his or her *equal* as defined above, or if the father or grandfather is not honest or is a prodigal, or of bad behaviour, or it appears that the marriage is to the

[1] *Radd-ul-Muhtâr ; Fatâwa Kâzi Khân*, pp. 402—468.

[2] "There is no option of inspection or defect, in marriage," says the *Fatâwa Alamgiri.*

[3] *Radd-ul-Muhtâr*, Vol. II, p. 501.

manifest disadvantage of the minor, the contract, unless set aside before by the *walî* next to him in order, remains dependant on the ratification of the minor or minors on attaining puberty. The minors may either adopt it or rescind it as they choose. In the case of a male, the adoption must be *express;* in the case of a female, it may be either *express or implied* by conduct, that is, by cohabiting with the man to whom she was married.

But when a marriage is contracted for a minor by a person other than a father or a grandfather, if it is with an *unequal* as already defined, the contract is wholly inoperative (*not sahîh*). "It is only when it is with an *equal*," says the *Radd-ul-Muhtâr*, "that it remains dependant on the option of puberty."[1]

According to the Hanafî Law, where a contract is dependant on the option of puberty, it remains intact for certain purposes until a formal declaration has been made by the Kâzi setting it aside: that is, it will be regarded as subsisting for purposes of cohabitation and inheritance. In other words, if they choose to cohabit together, they may do so without renewing the contract; and should one of them die before the decree of the Judge, the survivor would be entitled to inherit from the deceased, "for death is tantamount to consummation." And if the husband dies, the woman would be entitled to her full dower.

"But," says the *Radd-ul-Muhtâr*, "the declaration of the Kâzi is not for the establishment of the right of option, but only for evidencing the exercise of the right."[2] Therefore, if a woman who is adult is married to a boy under the age of puberty who disappears for a considerable time, she may validly contract herself in marriage with another without waiting for his appearance.[3]

Similarly, if a minor girl is married to an adult, who after the marriage disappears or is imprisoned, and the girl attains puberty whilst the man is absent or in prison, and contracts herself in marriage with another, such marriage would, by parity of reasoning, be valid, and be tantamount to the cancellation of the contract. It is advisable, however, in this country, for the parties before entering into the second contract, to notify the circumstances either to the Civil Court or the nearest Magistrate.[4]

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[1] *Radd-ul-Muhtâr.*
[2] *Ibid*, p. 502.
[3] *Radd-ul-Muhtâr.*
[4] *Ibid.*

When two minors are married, and one of them attains puberty before the other, if he or she desires to take the matter before the Kâzi, the guardian of the other, (either his father or grandfather or their executors,) should be made the opposing party. If there is neither father nor grandfather, or either of their executors, the Kâzi should appoint a guardian for the minor husband.[1] There is no period fixed within which the matter should be brought before the Kâzi, though certain rules are laid down as regards the time when the right of option should be exercised. The Indian Law Courts have often gone wrong in convicting girls of bigamy, who, in their infancy had been contracted in marriage by their guardians, but who, on attaining their majority, had married other men. In any case, these convictions would be wrong ; for, supposing even consummation had taken place after the first marriage, the subsequent marriage being *shubhat-ul-akd*, neither the women nor the men marrying them would, under the Mahommedan Law, be liable to any punishment ; though the Kâzi might give back the woman to the first husband. But, when there has been no consummation, and the girl, on attaining puberty and during the absence or imprisonment of the man to whom she was contracted in infancy, marries another person, the second marriage, it seems to me, would be valid.

When a minor girl marries a person who was her equal, she having no guardian, and there being no Kâzi from whom sanction could be obtained, the marriage is lawful, but is dependant on her approval after arriving at puberty.[2]

The following passage in the *Fatâwa Alamgiri*, therefore, must be read by the light of the remarks made above :—

"Where minors are contracted in marriage by a father or grandfather, they have no option on arriving at puberty, but when contracted by any other than a father or grandfather, they have an option on arriving at puberty, and may either abide by the marriage or cancel it. This is the doctrine of Abû Hanîfa and Mohammed on the subject, but it is a condition that there shall be the decree of a Judge in the matter, contrary to the case of an option after emancipation. And if a boy or girl should choose to be separated, after arriving at puberty, but the Judge has not yet made the separation, when one of them dies, they have reciprocal

[1] *Radd-ul-Muhtâr.*

[2] *Radd-ul-Muhtâr*, p. 515

rights of inheritance, and up to the actual separation between them by the Judge, the husband may lawfully have intercourse with his wife."

Most of the text-books as well as digests of decisions lay down certain principles for the consideration of the question, when and how the right of option is lost. For example, it is said that mere silence, when the woman is a virgin, is sufficient to extinguish this option upon her part; so that if a woman, being a virgin, should arrive at puberty, and remain silent, her option would be at an end. But if she were not a virgin at the time of marriage, or if then a virgin and her husband had directed her to be conducted to his house, and she had arrived at maturity while living with him, her option would not be cancelled by silence, nor even by her rising from the *majlis*,[1] but it would be cancelled by her assenting explicitly to the marriage, or doing anything from which her assent might be clearly inferred, as, for instance, permitting cohabitation, or asking for maintenance, or the like. She would, however, still retain her option, if she merely continued to eat his food or serve him as before. When a woman is aware of the contract at the time of arriving at puberty, but is ignorant that she has an option, and remains silent, her option is annulled; but when she is not aware of the contract at the time of arriving at puberty, she has an option on receiving intelligence of it. "When a woman attains to puberty, and inquires the name of her husband, or the amount of the specified dower, or salutes the witness, the option of puberty is extinguished."[2]

"When a woman perceives the arrival of her puberty it would be well to exercise her option immediately on seeing the signs thereof, and when she observes it at night, she is to say, 'I have cancelled the marriage' and take witnesses when she rises in the morning, saying, 'Surely, I saw the sign now,' for she is not to be believed if she say, 'I saw it at night and cancelled.' This is reported in the *Majmooa Nawâzil*, the author saying, 'Even though it be not the actual fact.' Hishâm has said, 'I inquired of Mohammed regarding a young girl whose paternal uncle had contracted her in marriage, and who, on

[1] The place or company in which she may happen to be at the time of her attaining maturity.—*Hedâya*, Vol I, p. 105, *note*.

[2] *Fatâwa Alamgiri*; *Radd-ul-Muhtâr*, Vol. II, p. 508.

the appearance of her puberty, exclaimed, 'Praise be to God, I made my choice,' and (he answered) she has her option. But if she had sent a servant, on the appearance of her puberty, to seek for witnesses to attest her declaration, and the servant was unable to procure any, and she had, by reason of her residing in a retired place, delayed for some days, for want of witnesses, he would have made the marriage binding on her, as that would not be a sufficient excuse.' Ibn Sumaut reports, as from Mohammed, that when a woman makes her election to be free, and calls on witnesses to attest the fact, but delays for two months to bring the matter before the Judge, she may still avail herself of her option, unless she has intermediately cohabited with her husband."

"When there is a difference between the parties with regard to the option of puberty, the woman saying, 'I elected to be free, and rejected the marriage when I arrived at puberty,' while the husband says, 'nay, but you were silent, and your option has fallen to the ground,' the husband's word is to be preferred."[1]

If cohabitation takes place and the woman asserts that it was by force, preference is to be given to her statement.[2]

It will be noticed, however, that these *dicta* refer to cases where the position of the parties is such that the husband may avail himself of his right of cohabitation. But when he is absent at a great distance, or has not been heard of for a considerable term or is undergoing imprisonment for a protracted period, the mere fact that the woman does not give expression to the rescission of the contract immediately on attaining puberty would not annul her right, so long as it is expressed in unequivocal terms or by conduct as soon thereafter as possible and before the return of the first husband.

Suppose a girl is married to a man in her infancy, and before she attains her puberty he is transported for a criminal offence for life, it can hardly be contended that the girl could not exercise the right of rescission, unless she expressed the fact immediately on attaining puberty.

In numerous instances, adult married women have been entrapped or decoyed into British colonies in South America and

[1] *Fatâwa Alamgiri*; comp. the *Radd-ul-Muhtâr*, Vol. II. p. 508. That is, the burden of proof is cast on the wife.

[2] In this case the onus of proof is on the husband.

elsewhere, and once there, have never been able to return to India. With respect to these women, a question has arisen whether they could enter into lawful or *semblable* contracts of marriage in those countries. I think that if the women wrote to India (as was alleged they had done), and received no replies, in fact if they were unable to ascertain whether their husbands were alive or dead, they might, after observing the usual *iddat*, re-marry in those countries.

According to Abû Hanîfa and Abû Yusuf, a free woman loses her option of puberty even if she was unaware that she has such a right or that "it cannot be prolonged," "for the *Dâr-ul-Islâm*, is the *Dâr-ul-ilm*, and she, being free, is in a position to acquaint herself with the rules of the *sharaa*." According to Mohammed, the woman's right of option will be "prolonged" until she is acquainted that she has such a right, in other words, if she does not know that she has the right of rescinding the marriage, she will have the power to do so when she becomes aware of it.[1]

In a country like India, where the women are almost universally ignorant and which is only nominally a *Dâr-ul-Islâm*, the rule of Mohammed seems to be more reasonable and equitable.

Shiah doctrines.

The Shiahs differ materially from the Sunnis on this point. They hold that a marriage, contracted on behalf of minors by any unauthorised person (*fazûli*), *i.e.* any person other than a father or a grandfather, remains in absolute suspension or abeyance until assented to by the parties on arriving at puberty; that, in fact, no legal effect arises from it until such ratification, and if, in the interval previous to ratification, one of the parties should die, the contract would fall to the ground and there would be no right of inheritance in the survivor.[2]

It may be added that, under the Shiah Law, every person, other than a father or grandfather, contracting a marriage for an infant, is a *fazûli*, Even a mother contracting a minor child is regarded as a *fazûli*. A contract of marriage entered into by *fazûlis* is validated by the assent of the father or grandfather, if present and competent, or by the subsequent ratification of the minor or minors.[3]

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 508. [2] *Mafâtîh*; *Jâmaa-ush-Shittât*.
[3] *Jâmaa-ush-Shittât*.

Section V.

Causes for which a Marriage may be Cancelled.

When one of the parties to the marriage-contract is suffering from some disease, which prevents the consummation of the marriage, and this fact was not known to the other contracting party, the latter has the right of asking for a cancellation of the marriage.

There is great divergence between the Sunni and the Shiah doctrines regarding the power of cancellation given to the parties for the causes referred to, as well as regarding the procedure to be adopted for enforcing the cancellation. The question of procedure will be treated of in a future chapter; here, attention will be simply directed to the causes for which a marriage may be cancelled among both Sunnis and Shiahs.

Both schools allow a wife to claim a separation on the ground of confirmed and incurable impotency, if she married him in ignorance of this circumstance [1] The principle applies equally to those whose impotence arises from permanent infirmity and those whose incapacity is the result of mutilation, self-inflicted or otherwise. But in the first case, if the debility be only temporary and capable of being cured, it is not a sufficient cause for cancellation of the marriage.[2]

Sunni doctrines.

According to the Sunnis, the wife is entitled to separation if the husband is unable to consummate the marriage with her, notwithstanding that the inability is *special* in her case.[3]

Shiah Law.

According to the Shiahs, if the inability is only *special*, or, as it is called in English Law, *ad hoc*, the wife has no option.[4] Both schools deny the right of cancellation if incapacity supervened after consummation of the

[1] It is the same under the Hebraic Law. Pothier uses almost similar words in describing the right of the wife to claim a divorce for impotence "Il n y a qu'une impuissance perpetuelle et incurable, telle que celle qui résulte de la privation de quelqu'une des parties nécessaire à la generation qui forme un empêchement de mariage"—Pothier, *Cont. de Mariage*. Same under the Canonical Law.

[2] Comp. Pothier; "celle qui n'est que passagère, et dont on peut espérer la guérison ne rend pas la personne en qui elle se rencontre incapable de mariage." Incurable impotency existing at the time of marriage under the English Law entitles a wife to a divorce.

[3] *Fatâwa Alamgiri*, Vol. I, p. 707.

[4] *Sharâya*, p. 278.

marriage, and also if the woman had entered into the contract with a knowledge of the fact that the man was impotent.[1]

The right of option to annul a marriage is allowed to both parties on the ground of physical malformation, which interferes with connubial relationship, leprosy, insanity, and elephantiasis. The *Hedâya* at one place, however, says that if the husband be "a lunatic, leprous, or scrofulous," the wife has no option. But this opinion has not been adopted by the compilers of the *Fatâwa Alamgiri*, or any of the later jurists. It is expressly stated in the *Fatâwa*[2] that if the insanity be incurable, the wife has the right to claim a cancellation of the marriage, the procedure being the same as in the case of physical impotency. *Mutatis mutandis*, the continued insanity of the wife vests in the husband the right to claim a cancellation of the marriage. In all similar cases referring to women, the disease must have existed previous to marriage, in order to entitle the husband to claim a cancellation. If the disease supervened after marriage the husband has no power to have the marriage cancelled.[3]

Under the Shiah Law, the right of option possessed by a wife is more extended than that possessed by the husband. The wife, under the Shiah Law, is entitled to ask for a cancellation of the marriage on the ground of her husband's mental derangement, whether it is permanent or occasional, whether it existed before marriage or supervened after marriage.[4] In the case of the insanity of the wife, the derangement must be confirmed and must have existed from before marriage in order to entitle the husband to have the marriage cancelled. Occasional aberrations or stupors, though of frequent occurrence, do not give to the husband that right.[5] Shiah Law.

In all the cases referred to, the married parties have only a right of option. The husband or the wife may, on becoming aware of the nature of the disease with which the one or the other is afflicted, agree either to abide by the contract or to ask for a cancellation.

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[1] *Fatâwa Alamgiri*, Vol. I. p. 709; *Fusûl-Imâdiyâ*; *Fatâwa Kâzi Khân*, Vol. I, p. 298; *Sharâya*, p. 298; *Jâmaa-ush-Shittât*.

[2] *Fatâwa Alamgiri*, Vol. I, p. 710.

[3] *Ibid*, p. 754.

[4] *Sharâya-ul-Islâm*, p. 287.

[5] *Jâmaa-ush-Shittât*.

In the latter contingency the right must be exercised with as little delay as possible. Any unreasonable delay in availing themselves of the right of option would give rise to the presumption of acquiescence and waiver.

Fraud and misrepresentation.

If one of the parties to a contract has been induced by the other to enter into it on fraudulent misrepresentations, he or she has the right to ask for a cancellation, or, under the Shiah Law, to dissolve it without any formality, of his or her own motion, on becoming aware of the fraud (*tadlîs*). It is recommended, however, to obtain the *imprimatur* of the *Hâkim-ush-sharaa.*

If a man were to represent himself as legitimate, and it was proved afterwards that he was illegitimate, or if the husband were to assume a false lineage, and represent himself as his wife's equal in birth when in fact he is much her inferior, the woman has a right to cancel the marriage.[1]

Under the Sunni Law, if a woman fraudulently assume a higher rank or lineage than her own and thus induce the husband to enter into a contract of marriage, he would, on becoming aware of the deception, have no right of option.[2] Under the Shiah Law, he would be equally entitled with the woman to exercise the right.[3]

Shiah Law.

"When a man has married a woman on condition of her being free and she proves to be a slave, or when a woman has married a man on condition of his being free, and he proves to be a slave," both, *viz.*, in one case the husband, in the other the wife, have the right of cancellation.[4]

Sunni doctrines.

Under the Sunni Law, if the woman herself entered into the contract, she has no right of option, though her *walî* would have the right to object on the ground of inequality.

Shiah doctrines.

Under the Shiah Law, when a man marries a woman *stipulating* her to be a virgin, and finds her not one, he has no power to cancel the marriage. Under the Sunni Law there is a divergence of opinion, some of the jurists agreeing with the Shiah doctors, others holding that if the husband has been fraudulently deceived, he would have a right of option. The latter is the generally accepted view.

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 502; *Fatâwa Alamgiri*, Vol. I, p. 411; *Sharâya*, p. 289.

[2] *Fatâwa Alamgiri*, p. 411; *Radd-ul-Muhtâr*, Vol. II, p. 520.

[3] *Sharâya*, p. 290.

[4] *Sharâya*, p. 290; *Jâmaa-ush-Shittât*; *Mafâtih.*

Under the Shiah Law, when a father agrees to give his legitimate daughter in marriage to a man, and then substitutes the daughter of his concubine, the husband has a right of option. Or, when a father has deceived the husband with reference to the identity of the daughter to whom he has been married, the husband has the right to cancel the contract and ask for a return of the presents made by him.[1]

In all these cases, when marriage is cancelled by the exercise of the right of option vested in one or the other party, the separation has not the same effect as a divorce. Accordingly, where there has been no consummation, actual or constructive, the wife has no right to dower.

Section VI.

Effect of Apostasy from Islam on the Status of Marriage.

Under the Mahommedan Law, if a Moslem husband or a Moslem wife apostatise from Islâm, the apostasy has the effect of dissolving the marriage-tie between the parties. The Native Converts' Marriage Act has made a variation in this rule of the Mahommedan Law. Under the provisions of this Act, if the husband were to apostatise, he can still demand that his wife should maintain conjugal relations with him, and in case of her refusal he can sue for a divorce from her.

If the wife should elect to live with him after his apostasy from Islâm, the rule of the Mussulman Law would have no effect, and the marriage would, under the Act, remain valid, though its legal effects will be regulated by principles other than those of the Islâmic Law. Should the wife, however, refuse to cohabit with the apostate husband, the marriage would be set aside by the Judge.

Conversion to the Islâmic faith on the part of a man following any of the revealed religions, (Judaism, Christianity, and probably Zoroastrianism,) does not lead to a dissolution of his marriage with a woman belonging to his old creed. For example, if a Hebrew or a Christian husband were to adopt Islâm and the wife were to continue to follow the religion of her race, the marriage would remain

[1] There are numerous examples of *tadlis* given in the *Jâmaa-ush-Shittât*, and discussed in detail

lawful and binding. But should an idolatrous husband, married to an idolatrous wife, become a Mussulman, the connection between them will become unlawful and they should be separated unless she also adopts Islâm. Similarly, when a Hebrew or a Christian female, married to a husband of her own faith, adopts the Moslem faith, the marriage is dissolved unless the husband follows her example.[1]

When the parties are idolators and one of them embraces the Mussalman faith in the *Dâr-ul-Islâm*, Islâm should be offered to the other, and if the latter adopts it, the marriage will remain intact, otherwise the Judge should separate the couple. If the party to whom Islâm is offered remains silent and says nothing, the Judge is to offer Islâm for his or her acceptance three times in succession, and on his still remaining obdurate to decree separation. There is no difference between a discreet youth and one who is adult; so that a separation is to be made equally on the refusal of the former as of the latter, according to Abû Hanîfa and Mohammed. But, if one of the parties be young and without sufficient discernment, it is necessary to wait till he attains discretion; and when he attains the age of discretion Islâm is then to be offered to him; should he adopt it the marriage will remain intact; if not, a separation is to be made without waiting for his arriving at puberty. And if he be mad, Islâm is to be presented to his parents; and if they or one of them should embrace it, the marriage will continue, if not, a separation is to be made between the married parties. If the husband should embrace the faith and the wife should refuse, the separation does not amount to *repudiation*, but if the wife should embrace the faith, and the husband were to decline, and a separation is made in consequence, the separation amounts to a *talâk*, according to Abû Hanîfa and Mohammed.[2] When a separation takes place between them by reason of refusal, and it is after consummation, she is entitled to the whole dower; and if it is before

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[1] According to the Russian Laws, if a Jew were to become a Christian, his wife (if he has one at the time) would become immediately separated from him; so also if a Christian adopts any other faith.

[2] Islâm being an act of piety, is not a ground for separation, but the obdurate rejection of it is.—*Hedâya*, Vol. I, p 178. There is an exception, when the husband is a convert and the wife a *Kitâbia*, because the marriage is still lawful; see *ante*.

consummation, and through his refusal, she is entitled to half the dower; but if through her own refusal, she has no dower at all.[1] If the husband of a *Kitâbia* woman were to adopt Islâm, their marriage remains unaffected; but if the woman were to adopt Islâm the same procedure would be followed.

But when one of the married parties adopts Islâm in a foreign country, where the Laws of Islâm are not in force and the parties are not *Kitâbias*, or where the parties follow a revealed faith but the woman adopts Islâm, the dissolution of their marriage is suspended until she has completed three of her terms, whether cohabitation had taken place or not.[2] And if the husband should also adopt the faith before their completion, the marriage would remain subsisting, otherwise they would become separated without any decree or order of the Judge.

"When the parties are *Mustâmins* (non-Moslems who have taken up their abode in an Islâmic country under the guarantee of protection), an absolute separation is effected between them by presenting Islâm to the other, or by the expiration of three terms. The terms in these instances do not constitute an *iddat*, and for that reason there is no difference between a wife with whom cohabitation has taken place and one with whom it has not, and whenever a separation takes place on this account before consummation, there is no *iddat;* nor is there any, though the separation should take place after consummation, if the woman be an alien non-Moslem; and even though she were a Moslemah, the result would still be the same, according to Abû Hanîfa. If the woman, from extreme youth or advanced age, is not subject to the courses, the separation cannot be effected except by the expiration of three months, and if the woman be the convert to Islâm, and her husband should come from the *Dâr-ul-Harb* as a *Mustâmin*, there can be no separation, except by the completion of three terms. And in like manner if he should become a *zimmi*, after having come out a *Mustâmin*, so that if his wife should afterwards follow him, Islâm is to be presented to him; and if he adopt it, no separation is to be made between them. And so also if the

[1] Because the cause of separation proceeds from him. See *post*.

[2] That is, as Islâm cannot be formally presented for acceptance in a foreign country, the separation is effected by abstinence for three occurrences of the courses.

husband be the convert, and the wife comes out as a *zimmia*, there is no separation till she has had her *terms* and should separation take place by the completion of three terms, it is reported in the *Syar Kabîr* that this would amount to a separation by *talâk*, according to Abû Hanîfa and Mohammed."

Effect of apostacy by either of a married couple.

"Apostacy from Islâm, by either of a married couple, is a cancellation of their marriage, which takes effect immediately without requiring the decree of a Judge,[1] and without being a *talâk*, whether it takes place before or after consummation; yet, if the husband be the apostate, the wife is entitled to the whole dower when consummation has taken place, and half when it has not."[2]

Adoption of Islâm by a married non-Moslem female.

But when a non-Moslem female, whether a scripturalist or not, married to a husband who also is a non-Moslem, adopts Islâm, her marriage would become dissolved in the following manner. If the conversion takes place in an Islâmic country (*Dâr-ul-Islâm*) where the laws of Islâm are in force, she will have to apply to the Kâzi to summon the husband to adopt the Moslem faith, and on the husband's refusal to do so, the marriage would be dissolved. Should the conversion take place in a non-Islâmic or alien country (*Dâr-ul-Harb*), the marriage would become dissolved on the expiration of three months from the date of the adoption of Islâm by the woman. The Calcutta High Court has held[3] that India is not a non-Islâmic country, and that consequently when a married non-Moslem woman adopts the Mahommedan faith, and, thereafter, contracts a fresh marriage without applying to a Judge or a Magistrate to call upon the husband to adopt Islâm, she is guilty of bigamy. But it does not say what would happen if the Judge or Magistrate refused to listen to the prayer of the woman, or the husband declined to accede to her demand. It is to be presumed, however, that the Court's conscience would be satisfied on her making the application, and the first marriage would be regarded as dissolved on the expiration of three months.

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[1] *Durr-ul-Mukhtâr*, p. 216.

[2] As would be the case if it were a repudiation.

[3] I. L. 18 Cal., p. 236.

CHAPTER VIII.

MARRIAGE UNDER THE SHIAH LAW.

THE Shiah Law has been already sufficiently indicated in the preceding pages, but it may be useful to give a few more principles.

Marriage how contracted.

According to the *Mafâtîh*:—"In contracting a marriage, it is allowable to use an expression in the imperative mood, or in the future tense, but not any other."

"If either of the contracting parties be unable to speak the Arabic language, then he or she should employ any language that may be best known to him or to her. And if either of them be unable to speak at all, or be dumb, in such a case it would be sufficient if he or she indicates the contract by a sign or hint."[1]

This is amplified in the *Tahrîr-ul-Ahkâm*: "The contracting parties, if able (to speak), are required to use such expression as would indicate declaration and acceptance. But if both are, or one of them is, unable to speak, then a sign on the part of the person unable to speak, such as would indicate his or her assent, would be sufficient."

Acknowledgment of marriage.

When a man has declared himself to be the husband of a woman, and she has assented to the truth of the declaration, or when a woman has declared herself to be the wife of a man, and he has acquiesced therein, they are adjudged to be ostensibly married, as having mutual rights of inheritance. "But," says the *Sharâya*, "if one of them alone made such declaration, judgment for the effects of the contract is to be given against him or her alone, and not against the other."[2] This refers to a case when a man or a woman is dead, and somebody else turns up and claims to be his wife or her husband. In such a case, though a liability would attach to the claimant, no right would accrue.

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[1] *Sharâya-ul-Islâm*, p. 262.

[2] *Sharâya-ul-Islâm*, p. 263.

As under the Sunni Law, it is necessary that the bride, contracted in marriage, should be distinguished from others by some distinguishing characteristics either by name or by description.

When a marriage is contracted by a *marîz* (a person suffering from some illness) no rights would accrue unless there has been *copula*; so if he should die of that illness without consummating the marriage, the same would be invalid, and the woman would not be entitled either to dower or to inheritance.

Prohibited degrees.

Seven classes of women are prohibited to a man for consanguinity, namely: (1) the mother, and all female ancestors; (2) daughter and daughter's daughter how low soever, and son's daughters to the lowest degree in descent, in other words, all female descendants; (3) sisters, whether by the same father or by the same mother only, or by both parents; (4) sister's daughters, and their female descendants; (5) paternal aunts, whether they be the father's sisters of the whole or of the half-blood, as also the sisters of his grandfathers how high soever; (6) maternal aunts by the same father or by the same mother alone, or by both parents; as also father's as well as mother's maternal aunts how remote soever in ascent; (7) female descendants of his brother of the whole or half-blood.[1]

All consanguineous relatives are prohibited, except the children of paternal and maternal uncles and aunts how high soever.

The like classes of men, also, are prohibited to a woman; so that her father and all male ascendants, all male descendants, her brother and his male descendants, her sister's male descendants, her paternal uncle how high soever, and her maternal uncle how remote soever, are unlawful to her.

Affinity.

By reason of affinity a man is prohibited from marrying the mother and all female ancestors how high soever, and the daughters and female descendants how low soever, of a wife. So also is a man prohibited from marrying his father's wife or the wife of any ancestor how high soever.[2]

The prohibitions of affinity spring both from a valid marriage as well as from fornication. For example, if a man has illicit intercourse with a woman, her daughter is forbidden to him, as if the woman was actually married to him. So also if a man married

[1] *Sharâya-ul-Is'âm*, p. 266. [2] *Mafâtîh*.

a woman who happens to have a daughter by a prior marriage, the latter will be forbidden to him.

"If a man married a woman, but did not consummate the marriage, still her mother is for ever unlawful to him, and all her female descendants how low soever, are also prohibited to be married to him in conjunction with herself."

If there has been only a contract of marriage, but no consummation, the woman, nevertheless, would be unlawful to the father and the son of the man, but the woman's daughter is unlawful to him not in herself, but only in conjunction with her mother, so that if the man should separate himself from the woman (before consummation), he may lawfully marry her daughter.[1]

Zina or fornication, though a prohibitory cause, has no re- *Zina*
trospective effect. In other words, an illicit intercourse with any female relative of a wife does not vitiate her marriage.

If a man were to marry a woman who was observing the probation (*iddat*), whether for divorce or death, with a knowledge on his part of that fact and also of the unlawfulness of an union under such circumstances, the parties should be separated, and the woman will become unlawful to the man for ever, whether cohabitation had ensued or not.[2]

But if he were to marry her in ignorance of her being in the state of *iddat*, or in ignorance of the fact that such a marriage was illegal, and cohabitation followed and a child was born of the union, within the period provided by law, such child would be affiliated to the man.[3]

The parties must, nevertheless be separated, but the husband must pay the wife the dower specified in the contract. After separation, the woman must complete the *iddat* for the first marriage and afterwards observe another for the second.[4]

If a man were to commit adultery with a married woman whose husband was alive, or who was in her *iddat* for a revocable divorce, she would become perpetually unlawful to him, according to the generally received opinion.[5]

But fornication with a widow, or with a woman who was not observing *iddat* for a revocable divorce, or with an unmarried

[1] *Sharâya-ul Islâm*, pp. 271, 272.
[2] *Tahrîr-ul-Ahkâm*.
[3] *Sharâya*, p. 278; the latter is according to the Shaikh; the *Tahrîr-ul-Akhâm*.
[4] *Sharâya-ul-Islâm*, pp. 272, 273
[5] *Ibid*.

woman, does not, without any difference of opinion, prohibit her to him, and, consequently, he may lawfully marry her, however profligate she may be.

When a *muhrim* (person engaged in the performance of the *Hajj*), enters into a contract of marriage with a woman engaged in the same duty, knowing that it is not lawful for him to do so, she is for ever unlawful to him. But if he were not aware of the illegality, then, though that contract is vitiated, the woman herself is not prohibited to him, (that is, he may lawfully enter into another contract with her).

Equality.

As regards "equality" two conditions alone are insisted upon; (1) equality in respect of Islâm, in other words, the general profession of the Islâmic religion, and (2) ability to support the wife.[1] And the democratic principle is carried so far that it is declared to be lawful for a free woman to marry a slave, for an Arab woman to marry a Persian, and even for a Hashimite woman to marry a man of another family, and *vice versâ*.

When the *walî* of a woman marries her to a person who is not her equal,[2] she has a right to cancel the contract, though such contract would be binding upon her when entered into by herself.

Where a man has married a woman, and afterwards discovers that she had been previously guilty of fornication, he has no right to cancel the marriage, nor has he a claim against her guardian to refund the dower.

Except a father and grandfather, no other relation nor the Judge has the power of contracting a minor in marriage. As regards an adult, neither the father nor the grandfather has any power. Should the father or grandfather refuse to marry an adult and discreet virgin girl to an equal, when desired by her to do so, she can contract herself, even against their will.

An executor or executrix cannot act as a guardian in marriage, not even if the father had authorised him or her to do so, whether the (testator's) daughter be an infant or adult, and whether the father had or had not fixed a husband for his infant daughter. An executor, however, can contract in marriage a person who is of unsound mind, when it is for the latter's advantage.

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[1] See *ante*, p. 85.

[2] See *ante*.

When a person, other than the father or grandfather, contracts a minor, male or female, in marriage, its validity depends upon the ratification of the party for whom the contract is entered into, in other words, it is wholly inoperative until it is distinctly ratified by the minor on attaining majority.

A woman adult and discreet cannot only marry of her own accord and authority, but appoint an agent to contract her in marriage and can herself act as an agent in another's marriage.

CHAPTER IX.

TEMPORARY MARRIAGES.

Temporary marriages.

TEMPORARY marriages are regarded as lawful by the Akhbâri Shiahs. This peculiar institution, analogues of which are not unknown among Western communities,[1] flourished among the Sabæans and Zoroastrians from early times, and seems to have continued in force among those people even after their conversion to Islâm in spite of the prohibition of the Prophet.[2] Such marriages are known as *mutâa*, and are contracted for a fixed period of time, —as for a day, a month, or year, or for any other specified period. The Sunnis and the Mutazalas regard such unions as invalid.

Declaration and acceptance are considered as essential in this kind of marriage also. But the forms of expression by which such an union may be contracted are given as follows:—

"The proper terms expressive of declaration are '*zawwajtu-ka*,' '*muttatu-ka*' ('I have united myself to thee') and '*ankahtu-ka*' ('I have married thee'); by any of these, declaration is effected, and by none other than any of these can the contract be made."

At the same time, it is declared to be abominable, though not actually prohibited, to marry in the *mutâa* form a virgin girl who has no father; and if one should do so, says the *Sharâya*, he ought to refrain from connubial intercourse with her; the reason being that as such a marriage is to her prejudice, and she has had no paternal advice or guidance in the matter, she should not be subjected to the degradation of a temporary union.

Specification of dower necessary.

The specification of dower is an essential condition in the contract in the *mutâa* form, and upon failure of this, the contract itself is void. In this respect, it differs from a permanent contract of marriage.

Period must be fixed.

The second essential condition is that the period for which the contract is made should be specifically fixed. If there is no mention of the period, *the contract would become permanent*.[3]

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[1] See Hepworth Dixon's *New America*. [2] See *ante*, p. 309.

[3] *Sharâya*, pp. 280, 281.

The extent of the period is left to the parties, but it is necessary that some limit should be distinctly specified, so as to guard against any extension or diminution. Even if the time be shortened to any part of a day, the contract would be lawful, provided that its limit is distinctly known.[1] Period must be specified.

After stating these general principles, the *Sharâya* proceeds to lay down certain rules for the determination of these contracts.

1. When the term and dower both have been mentioned, the contract is valid ; but if there is a failure in respect of the dower, while the term is mentioned, the contract is void ; but if there is a failure in respect of the time (while the dower is mentioned), the contract, though reckoned void as a *mutâa*, is valid as a permanent marriage.[2]

2. Every condition stipulated for in this contract must be mentioned together with the declaration and acceptance, and no effect can be given to any stipulation previous to the contract unless the same be repeated at that time, nor to any condition made thereafter. As regards, however, the condition that has been mentioned in the contract, there is no necessity for its repetition after it.

3. According to the generally received views, an adult and discreet female may contract herself in a *mutâa* marriage, and her guardian would have no right to object, whether she be a virgin or not. But it is unlawful for a minor girl to marry except with the consent of her guardian, as it is abominable for a man to marry a fatherless virgin by the *mutâa* form.

4. According to the generally received opinion, a woman so married *cannot be divorced*, but the parties become absolutely separated upon the expiration of the period. Nor is the woman subject to *îla* or *laân*.[3] With regard to *Zihâr*[4] (in such a case), there is some doubt ; but, according to the most approved opinion, it may be exercised under this form of marriage.[5] No divorce in *mutâa* marriage.

5. If the marrying parties have stipulated in the contract that they should inherit from each other, or only one of them should inherit from the other, such contract is lawful ; and effect will be given to it. This is the opinion of Shaikh Jaafar Tûsi, and is Right of inheritance.

[1] *Sharâya*, pp. 280, 281. [2] *Ibid*, p. 281. [3] See *post*. [4] See *post*.
[5] *Sharâya*, p. 282.

recognised as law by the sect, though Allâmah Hillî has held the contrary, and apparently also the author of the *Tahrîr-ul-Akhâm*.

The children born of such an union are legitimate and inherit from their parents like the issue of a permanent contract.

6. In this form of marriage the woman's probation extends only for two terms when consummation has taken place.[1] The *iddat* of a widow, however, is four months and ten days, but if she is pregnant it lasts until the delivery.

The *Tahrîr-ul-Akhâm*, in order to give the fullest indulgence to the man, says that "a man may lawfully marry in the *mutâa* form wives above four, without limit, whether the women be free or slaves," though it adds that "the best opinion, however, is not to marry more than four."

If the man were to make to the woman a gift of the term (that is, to waive his right to her) before cohabitation, he would be liable for half the dower; but when consummation has taken place, she becomes entitled to the whole dower "on condition of her keeping the term (and adhering to him till its completion); but if it is not completed, the man is entitled to deduct a proportionate part of the dower."[2]

The wife is not entitled to any maintenance under this form of marriage, unless it is expressly stipulated in the contract, but when there is a stipulation to that effect she would be entitled to receive the maintenance during the whole term, even if the husband were to choose not to cohabit with her or what is called "to waive the term."

"Gift of the term."

As already stated, there is no divorce in this form of marriage; in other words, the husband has no power to divorce the wife during the term fixed; the contract being for a stipulated period fixed by mutual consent, comes to an end either by the efflux of the time so fixed or by the death of either of the parties. They may, however, dissolve the convenient relationship by mutual consent. This

[1] There are two other conditions which are unnecessary to mention. One, however, shows the particularity with which these lawyers laid down the legal rights of the parties. For example, in a permanent contract, both according to the Sunnis and the Shiahs, there can be no *izl, extrahere ante emissionem seminis*, as being contrary to the purpose for which marriage is instituted, whereas there may be in this.

[2] *Sharâya*, pp. 280, 281.

restriction on the power of divorce in marriages for stipulated periods seems to have proved irksome to some of the Akhbâri legists, and thereupon they hit upon a device, the ingenuity of which is equalled by its injustice. "In order to effectuate a discharge or release (*ibrâ*), the *consent* of the debtor is not necessary; the wife in a *mutâa* marriage is only a debtor, the husband is the creditor, *ergo* the husband can 'give away' the term or any portion thereof without the wife's consent." So argued these learned legists, and this argument is to be found word for word in the *Sharh-ul-Luma*. If this argument be correct, a man might induce a woman, of whose person he cannot otherwise possess himself, to enter into a *mutâa* marriage for a period of ninety-nine years, which is tantamount to a lifelong contract, and, after satisfying his lust, might throw her off at any time he likes—by simply declaring that he has made "a gift of the term." The doctrine referred to above, however, has received judicial recognition in the case of *Kamar Kadr* v. *Bibi Luddan*.[1] The facts of this case were as follows:—The plaintiff, Kamar Kadr, married the defendant, a young unmarried woman of respectable parentage by the *mutâa* form for a period of fifty years. A few weeks after the marriage he abandoned her, and, on her suing him for maintenance, alleged that he had married her for two months and a-half only. This was found to be untrue, and he was ordered, under the provisions of the Criminal Procedure Code, to pay the maintenance. He then brought a suit to have it declared that the marriage relationship had been dissolved by his giving up the term, and that, consequently, he was not bound to maintain the woman. There was no allegation of infidelity or misconduct against her. The defendant pleaded that, under the law of her sect, the husband could not dissolve the union, as alleged by him, of his own motion, and that even if he could do so, he was not absolved from his liability to maintain her, he having agreed to do so at the time of the marriage. After a varied fortune, the case came up to the High Court of Calcutta, and the learned Judges there held that the *Mabsût* was an old work and could not possibly have been known to the parties, but that the *Sharâya* was a later work and better known in this country and, therefore, more binding. And they accordingly held, with

Kamar Kadr v *Bibi Luddan.*

[1] I. L., 14 Cal., p. 236.

the aid of the gloss of the *Sharh-ul-Luma* that the husband, though he has no power of divorce, may still divorce his wife by giving up the term. They did not decide the other question raised by the defendant, that the husband was not absolved from his liability to maintain her by virtue of the agreement entered into at the time of marriage.

As I have already pointed out in the chapters on *Hiba*, there is great difference between the Shiah lawyers on the question of "a gift of a debt."

The doctrine of the *Mabsût*;

The Shaikh has stated in the *Mabsût*—"When some person has a *mâl* owing from another, and makes a *hiba* of the same to that other, it is an *ibrâ* (release) in the word *hiba*. And whether for the validity of a release, the acceptance of the person released is requisite or not, there is difference of opinion. One body [of Jurists] holds that, for the validity of an *ibrâ*, such acceptance is necessary; and so long as the person released does not accept it the release is not valid; and when not accepted, the right remains intact. And this view is correct [lit. strong], in my opinion, for when one person has a right against another, to discharge it is to confer an obligation; but nobody can be compelled to accept an obligation, otherwise [the result will be] though he does not accept, he will be forced to accept. [For that reason also] in the case of a gift of *dain* (debt) it is required that there should be acceptance; and without acceptance a *hiba* is not valid. Another body says that the *ibrâ* is valid, whether the person who is liable accepts it or rejects it."

of the *Ghunia*.

Similarly, the jurist, Abû Zahra, states in the *Ghunia*, that "if a person were to make a gift to another of what is due to him, that is a release by the word *hiba*; it is necessary, however, that the person from whom the debt is owing should consent to such discharge, for a discharge is conferring an obligation on the debtor, and there is no compulsion in the acceptance of a mere obligation."

The Mohakkik in the *Sharâya* expresses a different opinion.[1] He states that the gift of a debt to the debtor himself is valid and operates as a release, and "in release (*ibrâ*) acceptance (by the donee) is not a condition, according to the correct view." The "correct view" seems to be his own opinion. The author of the *Jawâhir*,

[1] *Sharâya*, p. 242.

after giving the dicta from the *Mabsût*, the *Ghunia*, the *Sarâir*, the *Intisâr* and other works of high repute, [illegible] among the Usûlis and Akhbâris, says that the opinion of the Mohakkik refers only to cases where the obligation is one-sided, for example, where one person owes to another a sum of money, the creditor may release or discharge the debtor, and in order to effectuate such a discharge the acceptance of the donee (the debtor) is not a condition precedent. But when the creditor has also certain obligations to perform, his discharge of the debtor (without the debtor's consent) would not absolve him from the liabilities to which he is subject. For example, if A agrees to pay to B 500 dirhems, on the condition that B should supply him for five years with the fruit of his garden, unless the contract is put an end to by mutual consent, a release by B to A, in respect of the 500 dirhems, would not absolve B from the liability of supplying the fruit for the period agreed upon.

Again, suppose A contracts to serve B for five years on condition of receiving a monthly stipend of five dirhems, and B without the consent of A, and before the expiration of the period, declares that he has no need for the service of A, in such a case he would not be absolved from the liability of paying the stipend fixed upon for the full period.

Viewed in the light in which the author of the *Jawâhir* puts it, the opinion of the Mohakkik would seem to be little different from that of his great predecessor; for the Shaikh and his disciples only say that a discharge cannot be given effect to against the will of the obligor: he may accept it or reject it; his acquiescence is tantamount to acceptance. But all this was lost sight of by the High Court. The question will have to be reconsidered probably.

Even the *Akhbâri* Mujtahid of Teheran, in his work called the *Sîrat-un-Nijât*, lays down that "though it is allowable [under the dictum of the *Sharâya*] to make 'a gift of the term,' it is incumbent to obtain the consent of the wife احوط قبول زوجه."[1] And adds that in spite of the gift *every condition laid down in the contract must be strictly carried out.*

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[1] احوط Literally means 'superlatively, precautionary'; in legal parlance it means 'incumbent'; See the *Jawâhir-ul-Kalâm.*

CHAPTER X.

RIGHTS AND DUTIES OF THE MARRIED PARTIES.

SECTION I.

ANCIENT CUSTOMS—MAINTENANCE—ABSENT HUSBAND.

THE Mahommedan Law lays down in express and emphatic terms the rights and duties which spring from marriage. Prior to the Islâmic legislation, and especially among the pagan Arabs, women had no *locus standi* in the eye of the law. The pre-Islâmic Arab customs as well as the Rabbinical Law dealt most harshly with them.[1]

The Koran created a thorough revolution in the condition of women. For the first time in the history of oriental legislation, the principle of equality between the sexes was recognised and practically carried into effect. "The women," says the Koran, "ought to behave towards their husbands in like manner as their husbands should behave towards them, according to what is just."[2] And the Prophet in his discourse on the *Jabl-ul-Arafât* emphasised the precept by declaring in eloquent terms, "Ye men, ye have rights over your wives, and your wives have rights over you."[3] In accordance with these precepts, the Mahommedan Law declares *equality* between the married parties to be the regulating principle of all domestic relationship. Fidelity to the marriage bed is inculcated on both sides; and unfaithfulness leads to the same consequences, whether the delinquent be the husband or the wife. Chastity is required equally from man and woman.[4]

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[1] Caussin de Perceval, *Hist. des Arabes*, Vol. III, p. 337.

[2] Koran, chap. II., v. 228.

[3] Ibn Hishâm. In the *Fath-ul-Kadîr* these precepts are given at length. And the *Radd-ul-Muhtâr* says there is *Ijmâa-ul-ummat* on this point.—Vol. II, p. 1062.

[4] "Unchastity of the eye is more culpable," says the Mussulman moral law, "than unchastity in fact." This rule is not one-sided.

The husband is legally bound to maintain his wife and her domestic servants, whether she and her servants belong to the Moslem faith or not.[1] This obligation of the husband comes into operation when the contract itself comes into operation, and the wife is subjected thereby to the marital control.[2] It continues in force during the conjugal union, and in certain cases even after it is dissolved.

"In the language of the Arabs," in other words, literally,— *nafkah* means what a man spends over his family. "In the language of law," it signifies food, clothing, and lodgment. This has been mentioned by Imâm Mohammed. . . . The *nafkah* of a person becomes incumbent upon another from three causes: (1) from being a wife; (2) from being a relation; (3) from being a slave or servant.[3] Karkhi has said that in fixing the amount of maintenance regard is to be paid to the condition of the husband and not to the position of the wife, and this is the *Zâhir-ur-Rawâyèt*, and also the doctrine of Imâm Shâfeï. But Khassâf has said, and so it is stated in the *Iledâya*, that when the condition of the husband and wife are not equal, in other words, when one is rich and the other poor, a proper mean should be adopted between the two; and on this is the *Fatwa*. And the *Iledâya* supports its view by the *hadîs* in the *Sahîh-ul-Bokhârî* from Ayesha, that on one occasion Hind, daughter of Otba, came and complained to the Prophet that her husband Abû Sofian was a miser, and did not support her and her child properly. The Prophet said, 'take what is necessary, but be moderate.'"[4] Meaning of *nafkah*.

The husband is bound to maintain his wife even if she be residing in her father's house, provided he has not required her to come to his own house, and can cohabit with her there.

If he has called upon her to come and live with him, and she has refused without any valid or justifiable reason, such as the non-payment of prompt dower or illness, she is not entitled to

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[1] "It is incumbent on the husband to maintain his wife," says the *Fatâwa Kâzi Khân*, "whether she be Moslemah or non-Moslemah (*zimmia*), poor or rich . . . young or old. . . . ." Vol. I, p. 479.—*Radd-ul-Muhtâr*, Vol. II, p. 1062.

[2] So I render the word *Ihtibâs* احتباس see *Fatâwa Kâzi Khân*, p. 479.

[3] *Radd-ul-Muhtâr*, Vol. II, p. 1063.

[4] *Ibid*, p. 1066.

maintenance while residing in her father's house. But if she is ill in her father's house, and the husband wants to remove her to his house, and there is no risk or danger to her health in such removal, and she refuses, she will not be entitled to maintenance.

A man is not liable for the maintenance of a woman whom he has married by an illegal contract,[1] or of one who has become unchaste.

A wife cannot be compelled to go on a journey with her husband against her will, and the Kâzi should not constrain her to accompany him. In case of refusal to go with the husband, she does not lose her right of maintenance, and would be entitled to it during the husband's absence.[2]

If the husband is away from home and deputes a stranger or a *ghair-mahram* to fetch her to him, she would be entitled to refuse to accompany the messenger.[3]

But a woman, who is living in her own house and would not allow the husband to "approach" her, is not entitled to maintenance, unless she has asked him to take her to a house of his own, and he has either delayed or refused, and the woman has in consequence thereof prevented his "approaching" her.

A woman is not entitled to any maintenance if she has been imprisoned for any offence or has eloped with somebody or has been taken away forcibly by another person.

Respectable women not accustomed to do household work, such as grinding corn and cooking food should not be constrained to perform such duties, "though it was usual for our Lady Fâtima' taz-Zahra, who was the noblest (*afzal*) of women, to do such work, for that was the custom of Arabia."[4]

Maintenance. In fixing the amount of maintenance, the Kâzi must pay regard to the position of the parties, the requirements of the wife and the dearness of provisions. And he may direct the payment to be made either daily, or by the month or by the year, as may be most convenient to the man, for a labourer earns by the day, and it may be convenient to him to pay daily. But in every case, it must be in advance, though the husband may agree to pay, and the wife may agree to take, the maintenance in any way he chooses.[5]

[1] *Radd-ul-Muhtâr*, Vol. II, p. 1065.
[2] *Ibid*.
[3] *Ibid*, p. 1067.
[4] *Radd-ul-Muhtâr*.
[5] *Ibid*, Vol. II, p. 1069.

If the woman be apprehensive of the husband leaving the place without paying her maintenance, she would be entitled to apply to the Kâzi to take security from him to pay the amount regularly.

If the husband is possessed of means, in other words, is not impecunious or poor, the wife is entitled to a servant. The number of servants is dependant on the means of the husband and the position of the parties and their requirements. And if the woman belongs to the nobility, her personal servant's maintenance is obligatory on the husband. And on this is the *Fatwa*.[1]

The maintenance (*nafkah*) of a wife includes everything connected with her support and comfort, such as food, raiment, lodging, &c., and must be provided in accordance with the social position occupied.[2]

The wife is not entitled merely to maintenance in the English sense of the word, but has a right to claim a habitation for her own exclusive use, to be provided consistently with the husband's means. It is incumbent on the husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated by her, because this is essentially necessary to her, and is, therefore, her due, same as her maintenance, "and the word of God appoints her a dwelling-house as well as a subsistence."[3]

A minor wife.

According to the Hanafî and the Shiah doctrines, if the wife is a minor so that the marriage cannot be consummated, there is no legal obligation on the husband's part to maintain her.[4]

With the Shâfeïs it makes no difference, in the obligation of the husband to maintain his wife, whether the wife be a minor or not.[5]

Nor is a husband, under the Hanafî and the Shiah Law, entitled to the custody of the person of a minor wife whom he is not *bound* to maintain.[6]

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[1] *Radd-ul-Muhtâr*, Vol, II. p. 1079.

[2] *Ibid*, p. 1062 ; *Fatâwa Alamgiri*, Vol. I, p. 737 ; *Fatâwa Kâzi Khân*, Vol. I ; *Jâmaa-ush-Shittât ; Mafâtîh ; Hedâya*, Vol. I, p. 392, 401.

[3] *Hedâya*, Vol, I, p. 401.

[4] *Fatâwa Alamgiri*, Vol. I, p. 773 ; *Kanz-ud-Daḳâik ; Hedâya*, Vol. I (Eng. Trans.), p. 394 ; *Jâmaa-ush-Shittât ; Radd-ul-Muhtâr*, Vol. II,, pp. 1061, 1062. If the girl, though under puberty, is capable of being a companion to her husband, she is entitled, says the *Radd-ul-Muhtâr*, to maintenance.

[5] *Kitâb-ul-Anwâr ; Hedâya*, Vol, I, p. 394.

[6] In *re Khatija Bibi*, 5 Bengal Law Reports, O.C. J., 557.

When husband minor and wife adult.

If the husband be a minor and the wife an adult, and the incapacity to complete or consummate the contract be solely on his part, she is entitled to maintenance.[1] If both are minors there is no liability for maintenance.

It makes no difference in the husband's liability to maintain the wife, whether he be in health or suffering from illness, whether he be a prisoner of war or undergoing punishment, "justly or unjustly," for some crime, whether he be absent from home on pleasure or business, or gone on a pilgrimage, and whether he be rich or poor.[2] In fact, as long as the status of marriage subsists, and as long as the wife is subject to the marital power, so long she is entitled to maintenance from him. Nor does she lose her right by being afflicted with any disease.[3]

A woman is also entitled to her maintenance though refusing to come to her husband's abode on the ground that he had not paid her her prompt dower. This is according to Abû Yusuf and on this is the *Fatwa*.[4]

Desertion.

When the husband has left the place of the conjugal domicil without making any arrangement for his wife's support, the Kâzi is authorised by law to make an order that her maintenance shall be paid out of any fund or property, which the husband may have left in deposit or in trust, or invested in any trade or business.[5]

A wife may contract debts for her support during the husband's absence, and if such debts are legitimate and contracted *bonâ fide* for her support, the creditors have a "right of recovery" against the husband.[6]

Hanafi doctrines.

"If the husband be unable for the time being to maintain his wife, it would not form a cause for separation," says the *Hedâya*, "but the Judge may direct the woman to pledge her husband's

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[1] *Hedâya*, Vol. I, p. 395; *Radd-ul-Muhtâr*, Vol. II, p. 1061; *Fatâwa Kâzi Khân*, Vol. II, p. 480; *Jâmaa-ush-Shittât*.

[2] *Fatâwa Alamgiri*, Vol. I, p. 733.

[3] *Ibid*, p. 734; *Radd-ul-Muhtâr*, Vol. II, p. 1060; *Jâmaa-ush-Shittât*. The *Radd-ul-Muhtâr* adds, "and it makes no difference in the liability of the husband even if the wife owing to some malformation is incapable of cohabitation," p. 1061.

[4] *Radd-ul-Muhtâr*, Vol. II, p. 1060.

[5] *Fatâwa Alamgiri*, Vol. I, p. 750.

[6] *Nail-ul-Marâm*.

credit and procure necessaries for herself, the husband remaining liable for the debts."

The *Fatâwa Alamgiri* is more detailed. "When a man goes to the country, leaving his wife in town, the Judge may decree her maintenance against him, notwithstanding his absence, and it is not necessary for this purpose that he should be absent on a journey. If he has left substance in his house of the same nature as is required for her maintenance, such as *dirhems and dinârs*, or food, or cloth suitable for apparel, the Judge may direct her to take out of that a sufficiency for her maintenance. And when the absent man has left property in the hands of a third party, maintenance may be decreed to her out of such property, whether it be held in trust, or deposit, or in *muzâribat*,[1] for him. In all cases in which a Judge may decree maintenance to a wife out of the property of her husband, she may lawfully take it herself out of the property without his order, to such an extent as may be justified by common usage. But where the property left by a husband, in his own use or in deposit, is of a different nature from that which a woman is entitled to for maintenance, it can neither be sold by herself nor by the Judge on account of her maintenance, and upon this point all are agreed."

"A man is not to be separated from his wife for inability to maintain her. But the Judge may direct her to raise her maintenance by borrowing on his credit. But if she should disburse anything for her maintenance out of her own property after the decree of the Judge or a mutual agreement of the parties, she has a right of recourse against her husband. And so, also, when she contracts debt on account of it as against her husband, whether with or without the Judge's permission; except, that when it is without his permission, she herself is alone responsible, and the creditor cannot have recourse against the husband, while if it is with the Judge's permission, she can transfer the responsibility to her husband so as to give the creditor a right of action against him."

Shâfeï and Hanbali doctrines.

Under the Shâfeï and Hanbali system, inability on the part of the husband to maintain the wife, absence without any provision for her maintenance, desertion, cruelty and the like causes entitle

[1] Partnership business, invested in trade.

a woman to apply for and obtain a separation from the Kâzi. And, though the Hanafî Law does not recognise this principle, it authorises the Hanafî Kâzi to make over the case to the Shâfeï Kâzi, whose decision would become imperative among the Hanafîs and be given effect to by the Hanafî Kâzis.

"According to Imâm Shâfeï, it is lawful (for the Kâzi) to separate the husband and wife on account of the *iflâs* of the husband (*i.e.*, his impecuniosity and consequent inability to pay her her maintenance), as also from the injury to the wife if he is absent;" in other words, from injury resulting to the wife from desertion.

This is the text of the *Tanwîr-ul-Absâr*.

The comment of the *Radd-ul-Muhtâr* runs thus:—"Indeed, according to Imâm Shâfeï, when the husband is unable to discharge his obligation of maintaining the wife, the wife would be entitled to have the marriage cancelled. Similarly, if the husband has gone away and she cannot obtain any maintenance from him or it is difficult to do so, she would be entitled to obtain a cancellation of the marriage. This (doctrine) has been adopted by many of the Shâfeïs, but the reliable doctrine among them is, that so long as the woman is rich she would not be entitled to have her marriage cancelled, even though the husband has disappeared and no news can be obtained of him, and it is difficult to get any maintenance from his property .... But if the woman establishes that she has no means, nor has the husband left any with which she can support herself, she would be entitled to have the marriage cancelled .... And the result of all this discussion is that, according to the Shâfeïs, if the husband be present, and be unable to afford maintenance, it is lawful for the Kâzi to cancel the marriage. So also if he has disappeared altogether, and also when he has gone away temporarily and she cannot obtain any maintenance from him or from his estate or can obtain it with great difficulty .... 'Our'[1] Mujtahids will give effect to the first ground of cancellation but not to the second or the third."

"Imâm Ahmed ibn Hanbal was asked, as is stated in the *Fatâwa Kâri-ul-Hedâya*, as to the case of a woman whose husband has disappeared or gone away and left no maintenance. He answered if the woman goes before the Kâzi and asks him to cancel the

[1] The Hanafî Kâzis.

marriage, it is lawful for him to do so even though the husband is absent. But if he be present, the Kâzi must obtain proof that he does not maintain her or is unable to do so. And if the woman re-marries after observing her *iddat* it is lawful for her to marry another man."[1]

In the text it is added "that though the Hanafî Kâzi may not give effect to the Shâfeï doctrine he may delegate the task of deciding the matter to a Shâfeï Kâzi. And if there be no fear of collusion the separation will be effective."

The same principle is given in the *Sharh-ul-Vikâya* :—

"If the husband is unable to pay the wife's maintenance, they will not be separated, but she will be ordered to borrow on his credit and spend for her maintenance ; and the husband will have to discharge all such debts. This is according to 'us' (Hanafîs). According to Imâm Shâfeï, the Kâzi will separate the two, when the husband is unable to discharge the obligation in the usual way. And, therefore, to relieve the woman from oppression, the Kâzi has the power to cancel the marriage. And 'our' masters, when they saw the necessity for the application of this rule for separation, and when they saw how difficult it is to discharge an unceasing want by incessant borrowing, and the truth being that such borrowing is difficult and such lender difficult to obtain, and the fact of the husband having means is imaginary, they [the masters] have, upon a liberal interpretation, held it commendable to depute a Shâfeï Kâzi to decide the case."

In Algeria, where the French, with commendable wisdom, have maintained the indigenous institutions intact, no difficulty arises. When a case of this kind arises among the Hanafîs, the Hanafî Kâzi refers the parties to the Shâfeï Kâzi, whose decision becomes binding. In India, there is neither a Shâfeï nor a Hanafî Kâzi. The Civil Courts profess to exercise the powers vested in the Kâzi, and it is to be presumed that they would act, in cases of marital disputes, in the manner indicated, that is, when the Hanafî Law is silent or refuses to give any relief, they would have recourse to the Shâfeï doctrines.

Shiah doctrines.

Under the Shiah Law the following procedure is pointed out in case of disputes between married parties.

[1] *Radd-ul-Muhtâr*, Vol. II, p. 1080.

"In case of discord between the husband and wife, and an apprehension of an actual rupture, the Judge should appoint two umpires, one from among the relatives of the husband, and the other from among those of the wife, to decide as may be best in the case. He may, in his discretion, appoint both not belonging to the family of either, or he may appoint one from the family of one party, and the other a stranger to both. These persons should, according to the most authentic doctrine, be sent, not merely as agents, but with powers to decide between the parties as judges. If they agree as to measures of accommodation, they can give them effect without reference to the consent of the parties. Except that, though the umpires should agree as to the necessity of a separation between them, this cannot be effected without the husband's consent, if it is to be by a *talâk* or divorce; or without the wife's agreeing to a compensation, if it is to be by *khulâ* or release."[1]

"When the umpires have been sent by the Judge, and the parties, or either of them, refuse to appear before them, some (lawyers) are of opinion that judgment cannot be given as it would be against an absent person. But it were better to say that it can be given, for it is limited to what is for the good of the parties, and actual separation is made dependent on their own permission."

In case, either of the parties happens to be recalcitrant, the modern practice seems to be to give effect to the award of the arbitrators against his or her consent.

Shiah doctrines—(*contd.*)

According to the Shiah doctrines when a person is missing, but has left sufficient provision for his family and it is known that he is alive, or when the wife is maintained by his guardian or somebody acting on his behalf, in such a case the wife has no option, but is required to wait for her return or until she hears that he is dead.

Husband missing.

But, when it is not known whether he is dead or alive, and the missing man has left no wherewithal for her maintenance, nor is there anybody to maintain her properly, she may, if she choose, apply to the Judge for permission to marry again. Upon receiving the application, the Judge should postpone the consideration of the matter for four years and institute an enquiry as to whether the husband is alive or dead. If the result of such enquiry be to prove that the husband is alive, the woman will be directed to wait, but it

[1] This evidently does not restrict the power of the arbitrators to a *tafrîk* or separation, when no liabilty is cast on either side.

is incumbent on the sovereign to give her maintenance from the *Bait-ul-Mâl* or public treasury. If, on the other hand, nothing can be heard of the husband, the Judge should direct her to observe for the missing man the *iddat* of death, and on its completion, the woman will be at liberty to contract lawfully another marriage. Should the missing person then reappear *before* the expiry of the *iddat*, the marriage remains intact. But should he appear after she has completed her *iddat* and married again, the second marriage will remain intact. And even if she has not married after the expiry of her *iddat*, the first husband will have no rights against her, nor can he make her cohabit with him, but he may re-marry her.

In India, such a procedure is impossible, for the Government would hardly grant maintenance to the wife of a missing man. And, therefore, by the analogy of the Algerian cases, decided in accordance with the Mâlikî doctrines, which are similar to the Shiah rules, the Court taking cognisance of the matter will, on proof of the husband's absence for four years without any provision for her maintenance, grant her permission to marry again on completing her *iddat*.

When the husband is absent and has left real property either in the possession of his wife or of some other person on his behalf, the wife is not entitled to sell it for her support, though she may raise a temporary loan on it, which the husband will be bound to discharge, provided the mortgage was created *bonâ fide* for her or her children's support, and did not go beyond the actual necessity of the case. Under such circumstances the mortgagee is bound to satisfy himself that the money advanced is applied legitimately to the support of the family of the absent husband.[1] General doctrines.

When the woman abandons the conjugal domicil without any valid reason, she is not entitled to maintenance.[2] Simple refractoriness, as has been popularly supposed, does not lead to a forfeiture of her right. If she live in the house, but do not obey the husband's wishes, she would not lose her right to her proper maintenance. If she leave the house against his will without any valid reason, she would lose her right, but would recover it on her return to the conjugal domicil.[3]

[1] *Fatâwa Alamgiri*, Vol. I, p. 737.

[2] *Ibid*, p. 733; *Jâmaa-ush-Shittât*.

[3] *Ibid*; *Jâmaa-ush-Shittât*; *Kitâb-min la-Euhazzar-al-Fakîh*.

What is a valid and sufficient reason for the abandonment of the conjugal domicil is a matter for the discretion of the Kâzi or Judge. As a general principle and one which has been adopted and enforced by the Kâzis' *mahkamas* in Algeria, a wife who leaves her husband's house on account of his or his relations' continued ill-treatment of her, does not come within the category of *nâshizah* and continues entitled to her maintenance.

A woman who is imprisoned for some offence, or is undergoing incarceration in the civil jail for non-payment of a debt,[1] or who goes on a voyage or pilgrimage without her husband's consent, has no right to claim any maintenance during her absence.[2]

Among the Shiahs, if she goes on an *obligatory* pilgrimage,[3] even without her husband's consent, she is nevertheless entitled to maintenance.

The husband's liability to support the wife continues during the whole period of probation, if the separation has been caused by any conduct of his, or has taken place in exercise of a right possessed by her. The husband would not, however, be liable to support the wife during the *iddat* if the separation is caused by her misconduct.[4]

"A woman undergoing the *iddat*," says the *Fatâwa Alamgiri*, "on account of *talâk* is entitled to maintenance and lodging, whether the *talâk* be revocable or irrevocable, and whether she be pregnant or not. The principle of this is, that when separation is induced by any cause proceeding from the husband, or by any cause proceeding from the wife in exercise of a right, or by any cause proceeding from a third party, the wife is entitled to maintenance during her *iddat*. But if the separation is induced by any fault of the wife, she is not entitled to it. A *malâinah*, separated by the proceeding of *laân*, is likewise entitled to maintenance and lodging. So also a woman separated by *khulâ* or *ilâ*, or by reason of the apostasy of her husband, or of his having been guilty of misconduct..... So also, the wife who has

[1] Should she be put in jail by the husband, she would not lose her right of maintenance.

[2] *Fatâwa Alamgiri*, Vol I, p. 734.

[3] *Hajj-ul-Farz.*

[4] *Fatâwa Alamgiri*, Vol. I, p. 746; *Fatâwa Kâzi Khân*, Vol. I, p. 481; *Jâmaa-ush-Shittât.*

obtained a cancellation of her marriage on the ground of the impotency of her husband, and a young girl who avails herself of the option of puberty on arriving at the proper age, and a woman who after consummation has been separated from her husband for inequality. But a woman who has apostatised, or who has been guilty of misconduct . . . . . has no title to maintenance, unless the misconduct was against her will.[1] And she does not lose her right to lodging whatever be the cause of separation ; because residence with her husband is in consequence of a right which he has over her, while maintenance is in consequence of a right which she has against him."[2]

Right of a *talâked* woman to maintenance.

It will be seen afterwards, that some of the schools recognise a right in the husband to *talâk* the wife, even though she may not be present and the proceeding may never come to her knowledge until some time after. But they hold that in such a case the woman would be entitled to her full maintenance until she becomes aware of the *talâk*, and for three months and ten days after the information reaches her.

If the woman be pregnant at the time of separation her right remains intact until she is confined of the child.

The *Hedâya* seems to imply that a woman is not entitled to maintenance during the period of probation she observes on the death of her husband.[3] As the Koran, however, distinctly says, "Such of you as shall die and leave wives ought to bequeath to them a year's maintenance," several jurists have held that a widow has a right to be maintained from the estate of her husband for a year, independently of any share she may obtain in the property left by him. This right would appertain to her whether she be a Moslemah or a non-Moslemah.

In the case of probation (*iddat*) observed by a woman on the death of her husband, the Sunnis calculate the period from the actual date of his decease ; the Shiahs from the day on which the wife receives the news of the death.

According to the Sunnis, the liability of the husband to maintain a pregnant wife from whom he has separated ceases at her confinement.[4] The Shiahs, on the other hand, hold that the

[1] *Kifâya*, Vol. II, p. 385.
[2] *Ibid.*
[3] *Hedâya*, Vol. I, p. 407.
[4] *Ibid*, p. 360.

liability lasts for the same period after confinement as if the woman was not *enceinte*.[1]

Maintenance when husband insane.

If the husband be insane, the wife is entitled, according to the Shâfeï doctrines and the views of the compilers of the *Fatâwa Alamgiri*, to maintenance for the period of one year, which is fixed by the Kâzi in order to discover whether the insanity is curable or not. The Mâlikîs, with whom the author of the *Hedâya* seems to agree, deny to the wife the right of asking for a dissolution of the marriage-tie on the ground of the husband's insanity. Among them, the wife, therefore, retains the right of maintenance during the insanity of her husband, however long continued. With the Shiahs, the wife is entitled to a cancellation of the marriage contract if the husband's insanity be incurable. Should she exercise this right and dissolve her marriage, her right to maintenance ceases.

Section II.

Conjugal Domicil.[2]

The Mahommedan Law lays down distinctly, (1) that a wife is bound to live with her husband, and to follow him wherever he desires to go;[3] (2) and that, on her refusing to do so without

[1] *Jâmaa-ush-Shittât.*

[2] It may be remarked, by the way, that the Mussulman Law on the subject of the conjugal domicil is very much in advance of the Jewish as well as the Roman Law. Under the Jewish Law, a woman who refused to follow her husband wherever he desired her to go, lost her right to her dower, and the possessions which she herself brought from her parents' home, together with all rights which the law vested in her. Under the Roman Law, a wife followed the domicil of her husband without the smallest right to question his choice; and this principle has been imported into the modern English Law. The Code Napoléon provides (Art. 214) that "the woman is obliged to live with her husband and to follow him wherever he proposes to reside;" the consequence being that, however, objectionable a place may be, the wife has no option in the matter. As will be seen from the text, the Mahommedan Law gives to the woman, in many cases, the right of questioning her husband's choice of the conjugal domicil.

Under the Code Napoléon, as under the Mahommedan Law, the woman who abandons the conjugal domicil temporarily, does not lose all the benefits of the contract of marriage (as is the case under the Jewish system), but simply her right to maintenance.

[3] Some jurists are inclined to hold that a wife may refuse to follow her husband into a country which is at war with the country of her domicil. This is the only meaning which can be attached to the dictum that she may refuse to go with him to the *Dâr-ul-Harb*.

sufficient or valid reason, the courts of justice, on a suit for restitution of conjugal rights by the husband, would order her to live with her husband.

The wife cannot refuse to live with her husband on pretexts like the following :—

(1) That she wishes to live with her parents.

(2) That the domicil chosen by the husband is distant from the home of her father.

(3) That she does not wish to remain away from the place of her birth.

(4) That the climate of the place where the husband has established his domicil is likely to be injurious to her health.

(5) That she detests her husband.

(6) That the husband ill-treats her frequently, (unless such ill-treatment is actually proved, which would justify the Kâzi to grant a separation).[1]

Obligation not absolute.

The obligation of the woman, however, to live with her husband is not absolute. The law recognises circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so, he cannot require her to re-enter the conjugal domicil or ask the assistance of a Court of Justice to compel her to live with him. The bad conduct or gross neglect of the husband is, under the Mussulman Law, a good defence to a suit brought by him for restitution of conjugal rights.

Stipulations entered into at time of marriage.

In the absence of any conduct on the husband's part justifying an apprehension that, if the wife accompanied him to the place chosen by him for his residence, she would be at his mercy and exposed to his violence, she is bound by law to accompany him wherever he goes. At the same time, the law recognises the validity of express stipulations, entered into at the time of marriage, respecting the conjugal domicil. If it be agreed that the husband shall allow his wife to live always with her parents, he

[1] Most of these examples are taken from the cases decided by the Algerian Kâzis and reported by Sautayra and De Ménerville. But those who have any experience of Indian life will see at once that exactly similar pretexts are urged by the Indian Mussulman women among the lower classes when they refuse to live with their husbands.

cannot afterwards force her to leave her father's house for his own. Such stipulation in order to be practically carried into effect *must* be express or entered in the deed of marriage, if any ; a mere verbal understanding is not sufficient in the eye of the law.

If the wife, however, once consent to leave the place of residence agreed upon at the time of marriage, she would be presumed to have waived the right acquired under the express stipulation, and to have adopted the domicil chosen by the husband. If a special place be indicated in the deed of marriage as the place where the husband should allow the wife to live, and it appears subsequently that it is not suited for the abode of a respectable woman, or that some injury was likely to accrue to the wife if she were to remain there, or that the wife's parents were not of good character, the husband may compel the wife to remove from such place or from the house of such parents.

The husband may also insist upon his wife accompanying him from one place to another, if the change is occasioned by the requirements of his duty.

Every case, in which the question of conjugal domicil is involved, will depend, says De Ménerville, upon its own special features, the general principle of the Mussulman Law on the subject being the same as in other systems of law, *viz.*, that the wife is bound to reside with her husband, unless there is any valid reason to justify her refusal to do so. The sufficiency or validity of the reasons is a matter for the consideration of the Kâzi or Judge, with special regard to the position in life of the parties and the usages and customs of the particular country in which they reside.

Section III.

Maintenance of Children.

Pre-Islâmic customs.

Among the pre-Islâmite Arabs, no obligation existed on the part of either of the parents to maintain their children, nor was any relation bound to maintain any other ; on the contrary, we learn from history that, during that dark period of rapine, slaughter, and misery which immediately preceded the promulgation of the Islâmic Laws in the Arabian peninsula, the birth of children imposed no obligations on the father. Female children, especially, were regarded as a misfortune, and were frequently buried alive to prevent their proving a burden to the tribe of their parents.

The Prophet of Islâm strongly condemned this inhuman and unnatural practice, and declared the maintenance of children to be obligatory on the father; at the same time, he directed that where the parents were infirm and old and unable to support themselves, the children should provide for their support. He required the children to treat their fathers and mothers with respect and consideration; nor did he ever cease to repeat the words, which, according to MM. Perron and Sautayra, mark the great distinction between his legislation and all the ancient systems, that "a respectful and obedient child shall attain to heaven in the footsteps of its mother." The Prophet's rules.

In consequence of these precepts, the Mussulman Civil Law imposes on parents the duty of maintaining their children, and of educating them properly. This obligation rests naturally upon the father; and the *Hedâya* declares, in terms which can hardly be misconstrued, that "the maintenance of minor children rests on their father, and no person can be his associate or partner in furnishing it," (that is, share the responsibility with him.)[1]

In all cases concerning the maintenance of infant children, consideration is chiefly to be paid to the interest of the children. So long as the father is able to maintain them it is incumbent on him to do so, and debts incurred on their behalf by any person are recoverable from him.

A man, who is able by his labour to procure sustenance for his family, is bound to support them, although he may be in straitened circumstances. In case the father wilfully neglects and deserts his children, legitimate or illegitimate, and refuses to maintain them when he has the means, he is liable to punishment at the discretion of the Kâzi.[2]

Difference of faith or creed between father and child makes no difference in the obligation of the father to maintain the child.[3]

Among the Hanafis, when the father is poor and the mother rich, the liability to maintain the infant children falls on her, with an eventual right of recovery against her husband, even though the children may have a rich paternal grandfather.[4] Hanafi rule.

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[1] *Hedâya*, Vol. I, p. 408.

[2] See the provisions of the Indian Act IV of 1882.

[3] *Fatâwa Alamgiri*, Vol. I, p. 750.

[4] *Ibid.* p. 752.

Shiah doctrine. Among the Shiahs, if the father be poor the liability rests primarily on the grandfather, if he have means, and not on the mother, even though she be rich.[1]

General doctrines. When the father and mother are both poor, the grandfather possessed of means, is liable to maintain his infant grandchildren, with a right to recover all money spent on them from the father. But if the latter be infirm, the grandfather would have no right of recovery against him for any debt incurred for the maintenance of the grandchildren.[2]

Maintenance of male children. The obligation of maintaining the male children lasts until they arrive at puberty. After this, a father is not bound to maintain his male children, unless they are incapacitated from work through some disease or physical infirmity, or are engaged in study. When male children are strong enough to earn their own livelihood, though not actually adult, the father may set them to work for their own subsistence, or hire them out for wages.[3]

If the male children are actually able to work, but the employment found for them is unsuitable or improper for their rank in life, they should be placed on the same footing as children labouring under some infirmity. Ability to work must, in such cases, be considered with reference to the social position of the children, as well as the parents; so that a father occupying a respectable position, in which the children have been brought up delicately, must not hire them out for work which is degrading in its nature or associations.

When an adult son is lame, or paralytic, or is in any way a cripple, the obligation of maintaining him rests on the father; so also if he be insane.

Maintenance of female children. A father is bound to maintain his female children until they are married, if they have no independent means of their own. He cannot hire them out for work or send them into service under any circumstance.

Marriage does not necessarily absolve the father from the obligation of maintaining his daughter.

Should he contract a daughter in marriage to a man, concealing the fact that she was suffering from a disease which furnishes the

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[1] *Jâmaa-ush-Shittât.*

[2] *Futâwa Alamgiri*, Vol. I, p. 753.

[3] *Ibid*; *Futâwa Kâzi Khân*, Vol. I, p. 482.

husband with legal grounds for dissolving the marriage, he would be liable for her maintenance in case of the dissolution of the marriage.

Children possessed of private property are to be maintained out of it from the time they are weaned. Until then the father is bound to support and provide suitable attendance for them.[1]

When a father maintains his children out of their earnings, it is his duty to be careful of the surplus and to make it over to them when they arrive at majority. If the father cannot discharge this duty, or if he be false to the trust reposed in him, the Kâzi should appoint some trustworthy person to take care of the earnings of such children until they are of age to receive them.

A father is bound to maintain his son's wife when such son is young, or poor, or infirm, or engaged in study.[2]

When a man is absent, but has left available property, the Judge may order maintenance out of the same for the following persons, *provided they are poor*, viz. (*a*) the wife ; (*b*) the male children if young, or, if adult, unable to earn their own livelihood ; (*c*) the female children, whether young or adult (if unmarried) ; (*d*) and the parents.[3]

A woman may compound with her husband for the maintenance of her minor children, but if such composition prove prejudicial to their interests it would not be binding on the mother. In the same way, if a woman, on separating from her husband, were to agree to take charge of the children of the union and support them without requiring any assistance, and if she were to discover subsequently that she was unable to do so from poverty, the law would compel the husband to support his children, in spite of the stipulation entered into at the time of separation.

A husband is not liable for the support of the children of his wife by a former husband, unless he has expressly agreed to do so at the time of the marriage.

When children have means, they are bound to maintain their parents if in straitened circumstances, and it makes no difference

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[1] *Hedâya*, Vol. I, p. 410; *Fatâwa Alamgiri*, Vol. I, p. 752 ; *Radd-ul-Muhtâr ; Jâmaa-ush-Shittât; Jâmaa-i-Abbasi.*

[2] *Fatâwa Alamgiri*, Vol. I, p. 753.

[3] *Ibid*, p. 754 ; *Badâya.*

in their liability whether the parents are Moslems or non-Moslems.[1] Even should the parents be able to eke out a livelihood by manual labour, the children would not be absolved from the obligation of helping to maintain them.

When the children are in straitened circumstances themselves, they are not bound to maintain their parents, unless these are absolutely infirm and unable to obtain a livelihood even by manual labour. In such cases, the children are required to share their food with their weak and infirm father or mother, or with both.

Under the Hanafî Law, a person is bound to maintain his grandparents, his infant male relations within the prohibited degrees, if they are in poverty; all female relations within the same degrees, whether infants or adults, when they are in necessity; and also all adult male relations within the same degrees, if they are blind or disabled, and, at the same time, poor. But, with the exception of the grandparents, the support of these relations is only a quasi-legal obligation.[2]

In the case of wife, child, parents, and grandparents, difference of faith, according to the Hanafî doctrines, makes no difference in the obligation of maintenance, but it is otherwise in the case of other relations.[3] A rich Moslem is not bound to support his poor non-Moslem brother or uncle or cousin.

According to the Shiahs, the Shafeis, and the Mâlikîs, the support of any relations besides the children, the parents, and the wife, is a mere moral obligation.[4]

Parents. *Daughters* as well as *sons* are liable for the maintenance of their poverty-stricken parents.[5]

When a mother is poor and the son is able to work for his livelihood, he is bound to support her according to his means, though he be in straitened circumstances himself.

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[1] It is incumbent," says the *Hedâya* (Vol. I. p. 411), "upon a man to provide maintenance for his father, mother, grandfather, and grandmother, if they should be in necessitous circumstances, although they be of a different religion . . . . but their poverty is a condition of the obligation."

[2] Comp. *Fatâwa Alamgiri*, Vol. I, p. 756.

[3] *Ibid.*

[4] Some of the Shiah jurists are in accord with the Hanafîs in placing the grandparents in the same category as parents.

[5] *Fatâwa Alamgiri*, Vol. I, p. 755; *Hedâya*, Vol. I, p. 412; *Bahr-ur-Râik; Jâmaa-ush-Shitrât; Mafâtîh.*

When a son is able to maintain one parent or grandparent only, the mother or the grandmother, as the case may be, has the preferential right. When a man has both parents and an infant child dependent on him, and has not the ability to support all of them, his child has the first claim on him.

When there are several persons on whom the liability of maintaining a particular individual devolves, the Hanafîs hold, that the liability should be apportioned according to the shares to which such persons would be entitled in the inheritance of the one whom they are required to support. For example, if a man who is poor have a son and a daughter, both possessed of sufficient competency, the son will have to contribute two-thirds of the maintenance, and the daughter one-third.[1]

From the principle adopted by the Algerian Kâzis and also from the cases given in the *Jâmaa-ush-Shittât*, it would appear that among the Shiahs and the Mâlikîs, the more rational rule is followed of apportioning the liability according to the individual means of the parties. For example, if the daughter is rich and the son comparatively poor, the larger proportion of the maintainance devolves on her.

When a particular sum is agreed upon between the person who is liable and the person to whom maintainance is due, or when the Kâzi has ordered a specific sum to be paid periodically, should a change occur in the circumstances of the parties, such change would justify a re-adjustment of the liability. If the liability has been fixed by an order of the Kâzi, it is in his discretion, upon a proof of a change in the circumstances of the parties, to modify his order to suit the new requirements of the case.

If the person against whom an order is made, fails to comply with it, satisfaction of the debt may be obtained either by an attachment and sale of his goods, or he may be imprisoned for contumacy.

A mere plea of poverty would not absolve an individual from the obligation of maintaining his wife or children. If the man be able to work for his livelihood, if he be not a cripple or so infirm that he cannot do anything to earn a sustenance, he is bound to provide for their maintenance.

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[1] *Hedâya*, Vol. I, p. 412; *Fatâwa Alamgiri*, Vol. I, p. 752.

CHAPTER XI.

ANTE-NUPTIAL SETTLEMENT.—MAHR.—PROMPT AND DEFERRED MAHR.[1]

SECTION I.

GENERAL OBSERVATIONS.

IN order to constitute a valid marriage, the Mahommedan Law requires that there should always be a consideration moving from the husband in favour of the wife, for her sole and exclusive use and benefit. This consideration is called *mahr* or *sadâk* in legal treatises, and in common parlance, *dain mahr*.

The principle of ante-nuptial settlements is not peculiar to the Mahommedan Law. Sautayra thinks that the custom originated in ancient times with the payments which the husbands often made to their wives as a means of support, and as a protection against the arbitrary exercise of the power of divorce.

Jewish rules.

The Jewish Law insisted upon the specification of the dotal debt prior to the contract of marriage, and considered all marriages without a consideration as invalid; but among the Hebrews, the dower settled on the wife was never made over to her for her exclusive use and enjoyment; she acquired, in fact, no right over it until the marriage was dissolved, either by the death of the husband or by divorce, in which case the dower was made over to her, in order to enjoy or to dispose of, according to her own desire.[2]

Islâmic legislation.

The Islâmic legislation regarding the marriage consideration differs in two important features from the rules prevalent among

[1] *Fatâwa Kâzi Khân*, Vol. I, p 425; *Fatâwa Alamgiri*, Vol. I, pp. 426—460; *Radd-ul-Muhtâr*; *Kanz-ud-Dakâik*; *Hedâya*, Vol. II, p. 58; *Durr-ul-Mukhtâr*; *Kitâb-ul-Anwâr*; *Jâmaa-ush-Snittât*; *Sharâya-ul-Islâm*; *Mafâtih*; *Irshâd-ul-Allâmah*; 1 Sautayra; D'Ohsson; Sicé.

[2] Among the Athenians and the Romans the woman brought the dowry. The Code Napoléon (Art. 1540) attaches the same character to the French *Dot*. In England, any property the woman brings with her is popularly called her *dowry*. It is in fact analogous to the *Jahâz* or *Jahêz* of the Mahommedans.

the Hebrews. In the first place, it does not consider a marriage, contracted without specification of dower, as invalid; when no dower is specified, the law presumes a consideration in favour of the wife, which is estimated on a recognised basis. In the second place, the wife acquires an immediate right over the dower, or that portion of it which is "exigible" in its nature.

Donatio propter nuptias.

The *mahr* of the Islâmic system is similar in all its legal incidents to the *donatio propter nuptias* of the Romans. It is a settlement in favour of the wife, made prior to the completion of the marriage-contract in consideration of marriage. There is, however, this essential difference between the Roman *donatio propter nuptias* and the *mahr* of the Mussulmans, that whereas the former is purely voluntary on the part of the husband, the latter is absolutely obligatory. "*Mahr* or dower is so necessary," says the *Fatâwa Kâzi Khân*, "to the marriage, that if it were not mentioned at the time of the marriage, or in the contract, the law will presume it by virtue of the contract itself."[1]

A stipulation on the part of the woman before marriage to abandon all her right to dower is invalid and inoperative under the Mahommedan Law, and should such a stipulation have been entered into, the wife would, nevertheless, be entitled to the customary dower. She can, if she choose after marriage, discharge the husband from his liability for the dower-debt, or make over to him any property she may have received from him in satisfaction of his liability.

Marriage valid though dower not settled.

It has, sometimes, been supposed that the validity of the marriage depends on the *constitution* of the dower, and that when there is no consideration for the contract of marriage, nor a settlement effected in favour of the wife, the marriage is invalid. The *Hedâya* and the *Fatâwa Kâzi Khân*, however, expressly declare that a marriage is valid, although there may not be any mention of dower at the time; "for," says the former authority, "the term *nikâh* (marriage), in its literal sense, signifies a contract of union, which is effected by the union of the man and the woman, and as the payment of *mahr* is enjoined by law, as a token of respect to the wife, its mention is not absolutely essential to the validity of the marriage. For just the same reason, a marriage is valid, although the man

[1] *Fatâwa Kâzi Khân*, Vol. I, p. 126; *Fatâwa Alamgiri*, Vol. I, p. 128; see also the *Jâmaa-ush-Shittât*.

were to engage in the contract on the especial condition that there should be no dower."[1]

Similarly, the Shiah *Sharâya* and the *Jâmaa-ush-Shittât* declare that "the mention of dower is by no means a condition precedent to the validity of a contract of marriage, so that if a man were to marry a woman without any mention or specification of dower, or with the express stipulation that there shall be no dower, the contract will be valid and the law will award the woman the customary dower."[2]

Section II.

Customary and Specified Dower.

Anything over which *dominion* or the right of property may be exercised, or anything which may be reduced into possession, either *in præsenti* or *in futuro*, anything, in fact, which comes within the meaning of the word *mâl*, and has a value, may according to the Hanafî doctrines, form the subject of dower.[3]

"Anything," says the *Fatâwa Alamgiri*,[4] "that is *mâl*, or property, and has a tangible value, is a valid subject for dower." *Munâfa* (profits accruing from land, investments, business, industry, &c.), may also form the subject of dower, excepting the man's own service, if he is a free man. If he marry, stipulating to render his own services to his wife in lieu of dower, the marriage would be valid, but the woman would be entitled to the customary dower.

Stipulation of service invalid.

The text of the *Tanwîr-ul-Absâr* is as follows:—"And if the husband be free and should marry either a free woman or a slave girl on condition of serving her for a year, in other words, a determinate period, the woman would be entitled to her *mahr-ul-misl*."

The comment of the *Radd-ul-Muhtâr*, on this passage, is as follows:—"If the husband should condition that he would serve

[1] *Hedâya*, Vol. II, Bk. i.

[2] Comp. the *Mafâtîh*, the *Irshâd-ul-Allâmah*, and the *Kitâb min-la Euhazzar-ul-Fakih*. In *Kumarunnissa Bibi* v. *Hussaini Bibi*, I. L. 3 All., p 266, it was held that it was not necessary, under the Mahommedan Law, that the dower should be agreed upon before marriage; it may be fixed afterwards.

[3] *Fatâwa Kâzi Khân*, p. 425.

[4] *Fatâwa Alamgiri*, Vol. I, p. 426.

المهر انما يصح بكل ما هو مال متقـــوم و المنافع تصلح مهرا غير ان الزوج اذا كان حراً وقد تزوجها على خدمة اياها جاز النـــكاح و يقضى لها بمهر المثل *

the wife for a year, this, according to the two Sheikhs (Abû Hanîfa and Abû Yusuf), would make the husband liable for the *mahr-ul-misl*. According to Imâm Mohammed the woman would receive the value of the services." The author of the *Radd-ul-Muhtâr* goes on to say that "here restriction is placed on the word 'service'; for, should a man marry a woman on the condition that he would carry her load, or ride her animals, or cultivate her land and such like matters, which result in profit, for a determinate period by way of dower, such a condition is valid. For, all this is the profit of *mahr*." According to the Hanafî doctrines, therefore, the assignment of insurance policies would form a valid *mahr*.

Among the Hanafîs, if a man were to marry a woman, engaging to instruct her in religion, or to take her on a pilgrimage (in lieu of dower), the stipulation would be inoperative, and the woman would be entitled to the customary dower.[1] According to the primitive Hanafî notions, when a man married a woman on condition of instructing her in the Koran, he became liable for the *mahr-ul-misl*; but according to the modern legists the condition is valid. Instruction in the Koran valid.

The author of the *Bahr-ur-Râik* states that it is lawful to receive remuneration for instructing in law or in the Koran, and that on this is the *Fatwa;* and that, consequently, it is lawful to make instruction in the Koran the subject of dower."[2]

When something is assigned by way of dower which is not in existence at the time, either substantively, or as a creation of the law, such assignment is not valid. For example, if a man were to settle on his wife, by way of *mahr*, the future produce of certain trees or lands in his possession, it would be invalid, and the woman would have a right to the usual dower. But the assignment of a *chose in action*, or the sale-proceeds of something of which he is the proprietor, would constitute a lawful *mahr*.[3] The passages in the *Radd-ul-Muhtâr* are distinct on this point.

The text of the *Tanwîr-ul-Absâr* is as follows:—"It is lawful for a man to assign for dower the ten dirhems which may be due to him from somebody else."

On this the comment runs thus:—"It is lawful for a man marrying a woman to fix for her dower any thing which may be due to

[1] *Fatâwa Kâzi Khân*, Vol. I, p. 426.

[2] *Fatâwa Alamgiri*, Vol. I, p. 427.

[3] *Radd-ul-Muhtâr*, Vol. II, p. 517.

him from her, or which may be due to him from somebody else. . . . . For example, if ten dirhems are due to him from Zaid, he may fix that for dower, and the woman would be entitled to get that amount either from the husband's debtor or from the husband . . . . . If the debt is owing from the woman herself, it is on the footing of *ain*, a thing in specie."

"Similarly, if a man were to fix for dower a *manfaat* (profit), that also will be lawful; for example, residence in a house, or the right of riding on an animal, the right of cultivation, &c., but that the period thereof should be ascertained.[1]"

Shiah and Shâfei doctrines.

Among the Shiahs and the Shâfeïs, however, a free man may assign to his wife his own services in lieu of dower.[2] Instruction in religion or art, an engagement to take the wife on a pilgrimage, the usufruct of property not in existence, contingent benefits, &c., may, according to the Shiah doctrine, form the valid subject of dower.[3]

Amount of dower.

The amount of dower or *mahr* varies in different countries; there is no fixed rule as to the maximum.[4] It depends on the social position of the parties and the conditions of the society in which they live. The *Radd-ul-Muhtâr* lays this down with considerable distinctness. "Whatever amount exceeding the minimum the man agrees to pay he will be liable therefor."[5]

The *Sharâya* says: "There is no limit either to the maximum or the minimum of dower," it being a matter of contract between husband and wife; so long as the article given or assigned by way of dower possesses any definite value, the assignment is considered valid. There is no distinction as far as this principle is concerned between the Shiahs and the Sunnis. Both schools recommend moderation in the amount of dower; but, as will be seen, this recommendation is totally disregarded by the Indian Mussulmans, for reasons which have been explained in the Introduction.

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 510.

[2] *Hedâya*, Vol. I, Bk. ii., chap, 3; *Sharâya*, p. 290.

[3] *Jâmaa-ush-Shittât.*

[4] Musab settled a dower of 500,000 dirhems on the grand-daughter of Abû Bakr. The Prophet did not enunciate any fixed rule as to the amount of dower. He expressly left it to custom and local usages; but as he appears to have settled 500 dirhems upon Maimuna, the Shiahs consider that amount to be the *mahr-i-sunnat*. The *Radd-ul-Muhtâr* says the dower of "our Lady" Fâtima was 400 dirhems.

[5] *Radd-ul-Muhtâr*, Vol. II, p. 511.

The early Hanafî lawyers fixed ten dirhems (equal to about five or six francs,) as the minimum for dower. The Mâlikîs, inhabiting a poorer and less populous country than that in which the early Hanafî lawyers flourished, consider three dirhems (one franc and eighty centimes) as the lowest sum which can be given by way of *sadâk* or *mahr*. This last amount was the dower which the Arab husbands, prior to the promulgation of Islâm, used to give their wives as dower, besides flocks of sheep, &c. It was also the lowest sum for the theft of which the penalty of amputation was inflicted.[1]

These minimums have been abandoned for a long time, and it has become customary in different countries to fix the amount of dower entirely by a consideration of the circumstances of the husband and wife.

In India, for example, among that portion of the Mussulman community which occupies an analogous position to the upper middle class of English society, the amount of dower ranges from 4,000 rupees to 40,000 rupees. In Behar, the latter is, generally speaking, the customary dower; in Lower Bengal, there is no custom. Among the lower classes, the *mahr* varies from 50 rupees to 400 rupees. In princely families, the dower consists of several lacs of rupees.

Customary dower.

When no dower is fixed at the time of marriage, or has not been distinctly specified either before or after marriage, or has been intentionally or unintentionally left indeterminate, the woman becomes entitled to what is called the *mahr-ul-misl*, "the dower of her equals," or the *customary* dower.

The customary dower of a woman is regulated with reference to the social position of her father's family and her own personal qualifications, and also, as the author of the *Hedâya* points out, to the dowers that have been given to her female paternal relations, such as her consanguine sisters or paternal aunts, or the daughters of her paternal uncles.

But, says the *Radd-ul-Muhtâr*, it does not necessarily follow from the rule that the customary dower should be regulated with regard to the position of her father's family, that no attention should be paid to the mother's position.

[1] "*Etudes sur la loi Musulmane*," par M. Vincent, p. 107. In mediæval England the theft of any article of the value of five shillings or upwards rendered a man liable to capital punishment.

In fixing the amount, other points besides the custom which prevailed in the woman's paternal family must also be taken into consideration. For example, if one sister marry a rich, and the other, a comparatively poor man, the dower of the one cannot be taken as a standard for the dower of the other. It is, therefore, laid down that, in order to find a proper test for the customary dower of a woman, "the *condition* of her husband in respect of wealth and lineage should be *like* that of the husband of the woman to whom *she* is compared."[1]

In the same way, a woman may be superior to all the female members of her father's family in intellectual attainments or personal attractions, and accordingly her dower can hardly be regulated by the *mahr* of her less fortunately endowed female relations.[2]

The customary dower or *mahr-ul-misl* varies, therefore, in amount according to the social position of the woman's family, the wealth of her husband, her own personal qualifications, the circumstances of the time, and the conditions of society surrounding her. No fixed rule can be laid down as to the amount of dower in any particular case; when, therefore, it is said that the dower of a woman, where no *mahr* is stipulated or specified at the time of marriage, should be the "dower of her equals," it is only intended to imply, that an approximation may be made by observing the custom which has prevailed in her father's family, provided she does not differ in intellectual capacity or personal attractions from the female relations with whom she is compared.[3]

Shiah doctrines similar

The same rule respecting customary dower is in force among the Shiahs. "The *mahr-ul-misl* of a woman," says the *Irshâd*, "is regulated by a regard to the nobility of her birth, the beauty of her person, and the custom of her female relations." To this the *Tahrîr-ul-Ahkâm*, and the *Jâmaa-ush-Shittât* add that, "as there exist different customs in different places in respect of dower, in fixing the amount of the *mahr-ul-misl*, regard must be paid to the local customs, with special reference to the dowers of the women,

[1] *Fatâwa Alamgiri*, Vol. I, p. 428; *Radd-ul-Muhtâr*, Vol II, p. 581.

[2] The *Hedâya* says: "In regulating the *mahr-ul-misl* of a woman, attention must be paid to her equality with the women from whose dowers the rule is to be taken, in point of age, beauty, fortune, understanding, and virtue, because the *mahr* varies according to any difference in all these circumstances, and, in like manner, it differs according to place of residence or time."—*Hedâya*, Vol. I, p. 148.

[3] *Radd-ul-Muhtâr*, Vol. II, pp. 581-582.

who are the equals of the female in question, in knowledge, lineage, wealth, understanding, &c."[1]

Among the Shiahs, dowers are of three kinds, *viz.* (1) the *mahr-i-sunnat* or traditional dower ; it refers to the amount of dower adopted by the Prophet, and is said to be 500 *dirhems ;* (2) the *mahr-ul-misl ;* and (3) the *mahr-i-mussámma*, the specified dower.

Some of the Shiah writers are of opinion that where no dower is settled at the time of marriage, and an approximation is made from the custom prevailing in the woman's family, the amount should not exceed the traditional 500 *dirhems.*

But this view has been long abandoned, and, now-a-days, the same principles which regulate the approximation of the customary dower among the Sunnis are in force also among the Shiahs.

When there is no example forthcoming for determining the *mahr-ul-misl*, the position of the father's family ought to be taken into consideration. And it is allowable, nay incumbent, on the Kâzi, in the absence of examples in the woman's family, to enquire into the custom among strangers occupying the same rank in life and living under the same circumstances—even in different cities. And when all the conditions are not similar, so much as are identical or analogous should be considered.[2]

The principles which regulate the determination of the *mahr-ul-misl* seem to have been apprehended by the Calcutta High Court in the case of *Ajeemoodeen Ahmed* v. *Hosseinee*,[3] where the learned Judges held in substance that a customary dower must be proved by showing a custom of the women of the wife's family to receive, rather than of the men of the husband's family to pay a certain dower ; the Mahommedan dower being the consideration paid by

Ajeemoodeen Ahmed v. *Hosseinee.*

[1] *Mahr-ul-misl* is presumed only in those cases when the union is legal. Mere concubinage does not give rise to the presumption of dower.—*Jámaa-ush-Shittát.*

[2] *Radd-ul-Muhtár*, Vol. II. pp. 583, 584.

[3] 4 W. R., 110. The idea, however, that the very best description of oral evidence should be produced to support a claim for dower when no *kábinnámah* is forthcoming, (7 W. R., 495, and 11 W. R., 65,) is founded on a misconception. As I have pointed out in the text, in some places *kábinnámahs* are in vogue, in others not. And, therefore, in the latter class of cases, the claim can only be established by oral testimony, the character of which must depend on the circumstances of each particular case and the nature of the evidence available.

the bridegroom for the marriage, and therefore regulated by the position and conduct of the bride, especially as Mahommedan men often contract most unequal marriages, though the means and position of the bridegroom must not altogether be excluded from consideration.

As a rule, however, dowers are always settled before marriage; and in India, especially, no condition relating to it is left for future determination.[1] Mâlik has recommended to his followers the payment of the entire dower prior to the consummation of marriage, and the rule prescribed by him is practically followed in all those countries where his doctines are in force.

Prompt and deferred dower.

As there is nothing in the Koran or in the *Ahâdis* tending to show that the integral payment of the dower prior to consummation is obligatory in law, the later jurisconsults, says M. Sautayra, have held that a portion of the *mahr* should be considered payable at once or on demand, and the remainder on the dissolution of the contract, whether by divorce or the death of either of the parties.[2] The portion which is payable immediately is called the *mahr-ul-muajjal*,[3] "prompt" or "exigible;" and a wife can refuse to enter the conjugal domicil until the payment of the prompt portion of the dower. The other portion is called *mahr-ul-muwajjal*,[4] "deferred dower," which does not become due until the dissolution of the contract. It is customary in India to fix half the dower as prompt and the remaining moiety as deferred; but the parties are entitled to make any other stipulation they choose. For example, they may allow the whole amount to remain unpaid until the death of either the husband or the wife. Generally speaking, among the Mussulmans of India, the *mahr-ul-muwajjal* is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfil the terms of the marriage contract in their entirety.

The late Sudder Dewânî Adâlut, of Agra, decided that when no specific portion of the dower was stipulated at the time of

[1] There are no bounds to the amount of dower; *Sharâya; Fatâwa Âdzi Khân*, Vol. I, p. 427. See the case of *Sugra Bibi* v. *Mazuma Bibi*, I. L., 2 All. p. 573.

[2] See the case of *Mehr Ally* v. *Amani*, 2 B. L. R., A C, p. 306.

[3] مهر المعجل

[4] مهر الموجل

marriage to be exigible, the wife would be entitled only to one-third as such, and the remaining two-thirds would become due on the decease of the husband. It does not appear from the report of that case, whether the decision proceeded upon the Shiah or the Hanafî doctrines.

Shiah doctrines.

Under the Shiah Law, when no time is specified for the payment of the dower, or where its nature is described only in general terms, and it is not mentioned in the contract of marriage how much is prompt and how much deferred, the whole is considered prompt.[1]

Hanafî doctrines.

Under the Hanafî doctrines, each case will be decided on its own individual merits. "When the parties have explained how much of the dower is to be *prompt*," says the *Fatâwa Kâzi Khân*,[2] "that much should be promptly paid. When this has not been done, the (qualifications of the) woman and the (nature of the) dower mentioned in the contract should be taken into consideration, with the object of determining how much of *such* dower should be promptly paid to *such* woman; and the amount so determined is to be *prompt* accordingly, without regard to the proportion of a fourth or a fifth, but what is customary is also to be considered. But when it is stipulated that the whole is to be *prompt*, the entire dower should be promptly paid without any regard to custom."

Similarly, it is laid down in the *Radd-ul-Muhtâr* that "when nothing is mentioned as to what portion should be prompt and what portion deferred, regard must be had to *urf* or custom, and on this is the *Fatwa*."[3]

And then the author adds that in Syria the custom is to make two-thirds *muajjal*.

But the parties may stipulate that the whole should be deferred, and even if it should be deferred until death or divorce, it would be lawful.

If the dower is deferred until the death of either party, and the husband dies, it becomes due on the expiration of the widow's *iddat*.[4]

It is lawful also to stipulate that the husband would pay as much as he can at once and the remainder in the course of a year.

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[1] *Jâmaa-ush-Shittât*.

[2] *Fatâwa Kâzi Khân*, Vol I, p. 426; *Fatâwa Alamgiri*, Vol. I, p. 448.

[3] *Radd-ul-Muhtâr*, Vol. II. This principle seems to have been overlooked in the case of *Bidar Bukht* v. *Khurram Bukht*, 19 W. R. P. C., p. 315.

[4] *Ibid.*

The decision of the Agra Sudder Court has been, to all intents and purposes, overruled by the Allahabad High Court. In the case of *Edun* v. *Mazhar Hussain*[1] and that of *Taufikunnissa* v. *Ghulam Kamber*, the Allahabad High Court adopted and enforced the principle of law stated in the *Fatâwa Kâzi Khân*.

In the first-mentioned case, the plaintiff Mazhar Hussain sued his wife for restitution of conjugal rights. A dower of 5,000 rupees was settled at the time of marriage on the wife, but it was not stipulated how much of it should be "prompt," and how much "deferred." The wife refused to take up her abode in the conjugal domicil until the payment of the "prompt" portion of the dower. It was held, that in the absence of an express stipulation whether the whole dower was to be "deferred," the payment of a portion must be considered "prompt;" and the amount of such portion was to be determined with reference to custom, but when there was no custom it must be determined by the Court with reference to the status of the wife and the amount of the dower; and, as in the particular case in question, the wife had led an immoral life previous to her marriage with the plaintiff, the lower Court was held to have exercised its discretion soundly, in holding that only one-fifth of the dower settled should, in her instance, be considered "prompt." The same rule was followed in the subsequent case of *Taufikunnissa* v. *Ghulam Kamber*.

When no settlement has been made prior to marriage, the parties may, subsequently, come to terms respecting the amount of it. Such dower is called *mahr-ut-tafwiz*; when the amount is settled by arbitrators, or by the Judge (*Hâkim-ush-Sharaa*), it is called *mahr-ut-tahkim*.

Hanafi doctrines.

The right of property over the subject of the dower vests in the wife, according to the Hanafi doctrines, on the occurrence of the following contingencies, *viz.*: (1) on the consummation of the marriage; (2) on a *valid retirement*, which among the Hanafis is considered equivalent to actual consummation; and (3) on the death of either the husband, or the wife, before or after consummation.[2]

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[1] I L., 1 All, p 483.

[2] The *Fatâwa Alamgiri* says: "Dower is confirmed by one of three things, consummation, valid retirement, or the death of either husband or wife, and that whether the amount of dower be named or be the *mahr-ul-misl*," p. 428.

For example, if a husband consummate the marriage, the wife becomes entitled to the entire dower settled on her, and though she may realise only the "prompt" portion, she can make an assignment of the whole, as a specified debt against her husband. The same would be the case if, instead of consummation, there had been a valid retirement of the parties into the nuptial chamber. Similarly, if the husband were to die, either before or after the consummation of the marriage, the wife would acquire an absolute right over the whole of her *mahr*; or, if she were to die under the same circumstances, her heirs would become entitled to the dower.

Shiah and Shâfeï doctrines.

According to the Shiah and the Shâfeï doctrines, the wife's right to the entirety of the dower vests in her only when the marriage has been consummated, or when either she or her husband has died before consummation and during the subsistence of the contract. According to these two schools, retirement without consummation does not entitle the wife to the entirety of the dower.

Under the Hanafî Law, when a separation takes place between husband and wife before consummation or *valid retirement*, she is entitled to half the specified dower. But when no dower has been specified at the time of marriage she is only entitled to a present, the amount of which depends upon the usages of the country. Even when a *mahr-ut-tafwîz* or *mahr-ut tahkîm* has been settled for the woman, she cannot claim a moiety of such dower, if the separation takes place before consummation, but is entitled to a present only.

The Shiahs agree in the main with the Hanafis. They also hold, that if a separation takes place *before consummation*, the woman is entitled only to half her specified dower (*mahr-i-mussamma*), but they differ from the Hanafîs in holding, that where a *mahr-ut-tafwîz* or a *mahr-ut-tahkîm* has been settled on the wife after marriage, and the husband separates from her before consummation, she is entitled to the moiety of such *mahr*, as in the case of the *mahr-i-mussamma*.[1]

When a present must be made.

Among the Hanafîs, the husband is bound to make a present to a wife, from whom he separates before consummation of marriage, when no dower has been specified. But it is only when the

[1] *Jâmaa-ush-Shittât; Irshâd ul-Allâmah.*

husband furnishes the cause of separation that he is liable for a present. For example, when he is separated from the wife by reason of impotency or apostacy, or when he separates himself by a *talâk*, he is under the obligation of making her a "present" (*mutat*), if there has been no consummation or *valid retirement*, and no dower has been specified before marriage. No present is due from him, however, when the cause proceeds from the wife. Were she to apostatise or commit adultery, or cancel the marriage in exercise of her option on the ground of inequality, fraud, &c., she would have no right to any present.[1]

The same principle is in force among the Shiahs. "If the husband and the wife separate *before* consummation (*and there is no dower specified in the contract or settled afterwards*), the wife is entitled to a present which is to be regulated by the position and the means of the husband."[2] "No woman, however," says the *Sharâya*, "is entitled to a present, except one for whom no dower has been settled, and who has become separated from her husband before consummation."[3]

Shâfeï doctrine.

Among the Shâfeïs, a present is incumbent on the husband in every case of separation.

When the right to the dower has once vested in the woman, it is not defeated or lost by any conduct on her part. For example, when the marriage has been consummated (according to the Sunnis as well as the Shiahs), or a valid retirement has taken place (according to the Hanafis), the woman's right to her dower is not lost by her subsequent apostacy or adultery; but it would be otherwise if the apostacy or misconduct occurred before the right vested in her. In such a case, the *entire* dower would fall to the ground.[4]

The right once vested is not lost, even if the woman were to murder her husband. Should she commit suicide or be killed by her husband, her right would pass to her heirs.[5]

Dower in the case of an invalid marriage.

A woman is not entitled to any *mahr* or present under an invalid marriage, judicially dissolved before consummation. Should

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[1] *Fatâwa Alamgiri*, Vol. I, pp. 428, 429.

[2] *Jâmaa-ush-Shittât.*

[3] *Sharâya*, p. 292.

[4] *Fatâwa Alamgiri*, Vol. I, p. 447; *Jâmla-ush-Shittât.*

[5] *Ibid.*

consummation take place before the order is made, she would be entitled to her *mahr-ul-misl*, which must not, however, exceed the specified dower.[1]

It must be borne in mind also that in an invalid marriage, dower does not become due upon a *valid retirement* as in the case of a valid marriage.

Prompt dower when realisable.

The *prompt* portion of the *mahr* may be realised by the wife at any time before or after consummation; the *deferred* portion remains unpaid until the dissolution of the contract. But actual possession is not necessary to enable her to exercise her rights over it. Deferred dower, in fact, is a *chose in action;* a woman can assign it to any one she chooses, and such person may recover the same on its becoming due, from the husband or his estate. The *Sharâya* says in explicit terms: "The dower becomes the property of the wife by the mere contract (when consummation has taken place), and she may deal with it in any way she likes, before she has obtained actual possession of the subject-matter." She can make a gift of the *mahr* either to her husband or to a stranger. In the former case, when she gives it to her husband, it answers as a discharge of his liability, or she may exchange it for any other property belonging to the husband. An exchange of property for dower is called a *Bai mukâsa.*

Bai Mukâsa.

A wife, says the *Fatâwa Alamgiri*, may make a gift of her dower to her husband, and none of her guardians, not even the father, has a right to object to her so doing.[2] She may exonerate her husband either from the payment of the whole debt, or only from part of it. In order to be valid, the exoneration must be made whilst she is in good health and of sound mind. In India, when a woman is on a death-bed, she generally "forgives" her husband the unpaid dower-debt. It is doubtful how far such discharges, granted *in extremis*, are valid.[3]

Under the Hanafî Law, a father cannot make any abatement in his daughter's dower in favour of the husband,[4] but, under the

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[1] *Radd-ul-Muhtâr*, Vol. II, pp. 573-574.

[2] *Fatâwa Alamgiri*, Vol. I, p. 446.

[3] The *Fatâwa* says: "It is necessary for a discharge to be valid that she should not be sick of death-illness at the time of giving her consent." Vol. I, p. 442.

[4] *Fatâwa Alamgiri*, Vol. I, p. 416.

the Shiah Law, a father or grandfather may do so, and such abatement will be valid, unless there is reason to believe it was done fraudulently.[1] Under no circumstances, however, can either the father or grandfather discharge the husband of a minor daughter from the *entire* debt.[2]

Dower is a debt like all other liabilities of the husband, and has preference over legacies bequeathed by the testator and the rights of heirs. A partition of the estate cannot take place until the dower-debt has been satisfied.

When the wife is alive she can recover the debt herself from the estate of her deceased husband. If she be dead, her representatives stand in her place and are entitled to recover the same.

Lien of the widow for dower.

Under the Mahommedan Law, there is no hypothecation without seisin, and therefore a widow has no absolute lien on any *specific* property of her deceased husband so as to enable her to follow it, as in the case of a mortgage, into the hands of a *bona fide* purchaser for value. The widow's claim for dower is only a debt against the husband's estate, and has priority over legacies and the rights of heirs.[3] Where, however, she has obtained actual and lawful possession of the estate of her husband, under a claim to hold them for her dower, she will be entitled to retain possession until the debt is satisfied, with the usual liability for account to the heirs.[4]

Ahmed Hussain v. *Musst. Khadija.*

In the case of *Ahmed Hussain* v. *Musst. Khadija*, the Calcutta High Court held that even where the dower was unascertained, but the widows were in possession of their deceased husband's estate in satisfaction of their *mahr*, they had a lien over it as long as any portion of the dower remained unsatisfied.[5]

If a widow, who has obtained possession of a property in lieu of dower, is dispossessed by the heir of her husband, such heir would take the property subject to her lien for dower.[6]

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[1] *Jâmaa-ush-Shittât.*

[2] *Sharâya*, p. 295.

[3] *Wahedunnissa* v. *Shubratun*, 6 B. L. R., p. 54. But if she omits to put forward her claim for dower and assents to a person taking a legacy, she cannot afterwards retract her assent.—*Reza Hossein* v. *Ifatoonnisa*, 24 W. R., p. 564.

[4] *Bachun* v. *Hamid Hussain*, 10 B. L. R., P.C.C., p. 45.

[5] 4 B. L. R., A.C., p. 28 note ; 10 W. R., p. 369.

[6] *Umed Ally* v. *Safikan*, 3 B. L. R. A. C., p. 175 ; *Janee Khanum* v. *Amatool Fatima*, 8 W. R. p. 51 ; see also *Fatima Begum* v. *Mariamunnissa Khanum*, 9 W. R., p 318.

A suit for ejectment against a widow in possession of her husband's estate for dower will not lie, unless it is alleged that such dower has been satisfied, as a widow in possession of her husband's estate under a claim of dower, has a lien upon it as against those entitled as heirs, and is entitled to possession as against them, till her claim of dower is satisfied.[1] Widow's lien for dower.

In the case of *Azizullah Khan* v. *Ahmad Ali Khan*,[2] the Allahabad High Court held that a Mahommedan widow lawfully in possession of her husband's estate occupied a position analogous to that of a mortgagee, and her possession could not be disturbed until her dower-debt has been satisfied, and that after her death her heirs were entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery. *Azizullah Khan* v. *Ahmad Ali Khan.*

But a widow in possession of her husband's estate pending payment of her dower is not entitled to alienate it. In the case of *Ali Muhammad Khan* v. *Azizullah Khan*,[3] the Allahabad High Court held that a purchaser of a deceased husband's estate from a Mahommedan widow, in possession thereof, pending payment of her dower, was not entitled to plead non-satisfaction of her dower-debt to a claim by her husband's heirs for their share of his inheritance, as the widow's right to dower was personal to herself, and did not pass to a purchaser of the estate. *Ali Muhammad Khan* v. *Azizullah Khan.*

In the case of *Moradunnissa* v. *Ameerunnissa*,[4] it appeared that a Mahommedan by a deed of dower had charged the whole of his estate, with a certain sum payable on demand by his wedded wife, without, however, impignorating the estate; the dower was not demanded during the lifetime of the husband, but possession was taken of the property by the widow in satisfaction of her claim. In dismissing the suit by the brother of the deceased, the Judicial Committee made the following observations:— *Moradunnissa* v. *Ameerunnissa.*

"Lastly, there remains the question of the distribution and administration of the deceased's estate. No such relief is asked by the plaint. The claim made by the plaintiff is as sole heir against the defendants, charging them with collusion in keeping him out of possession. He does not claim in the alternative, that if the

[1] 2 W. R., P. C., 55; 11 Moore's I. A., p. 252.

[2] I. L., 7 All., p. 353.

[3] I. L., 6 All., p. 50. See also *Ghufoorun Bibi* v. *Mustuhedeh*, 2 Agra, p. 300; and *Azeemun* v. *Asgar Ali*, 2 Agra, Part II, p. 167. [4] 6 Moore's I. A., p. 211.

marriage of the respondent *Moradunnissa*, and the deed of dower are proved, then that he may have his share of the estate. It is possible it might have been competent to the Court below, in their discretion, to have entertained such a question, but it was a matter of discretion for the Judge of the *Sudder Dewany Adawlut*. Independently of this, *Moradunnissa* was in possession, by the consent of the local authorities, a possession very analogous to that of an executrix here. That fact, however, is not sufficient to decide the point of right, but the plaintiff has not asked for an account. Again, he has burthened the record with a number of unnecessary parties who ought not to have been there, and that would have created very considerable inconvenience in taking accounts. He has also excluded all the movable estate, and that portion of the immovable estate of which he himself obtained possession. We are of opinion, therefore, that the Judges before whom the case has been heard in India, took the right and convenient course in dismissing his suit, and leaving him to bring another suit to obtain an account; that, no doubt, was the effect of their decisions, though not in terms. Under these circumstances, their Lordships will add a recommendation in their humble report to Her Majesty, that the dismissal of the appeal be without prejudice to the appellants' right to bring a suit for an account and administration of the deceased's estate consistent with the establishment of the marriage and the deed of dower. Costs, if any, incurred in *India* by reason of the appeal, must be paid by the appellants."

And the report which was made thereon was as follows :—

"Their Lordships do agree humbly to report to your Majesty as their opinion that the judgment or decree of the *Sudder Dewany Adawlut* at *Agra* of the 21st of April 1846, ought to be affirmed, without prejudice to any suit which may be instituted for the recovery of the rights of the late appellant, as one of the heirs of *Seyud Moostefah* consistently with the establishment of the marriage of the respondent, *Moradunnissa*, and of the validity of the deed of dower alleged by her in the suit, both of which facts their Lordships consider to be proved in this case, and their Lordships direct that all costs, if any, incurred by the parties to the suit in *India*, by reason of this appeal, be paid by the appellants."

In several cases, decided in the Sudder Court of the North-Western Provinces, it was held that when the widow, the defendant

in a suit for ejectment, was found to be in possession of the property in suit in lieu of dower, and that the plaintiff was not entitled to sue for possession thereof until such claim for dower has been satisfied, it was unnecessary to determine the question of the amount of such dower; that a Mahommedan widow was entitled to a lien for whatever dower remained due to her, although there might be a dispute as to what was the amount actually due, and that the heir not being entitled to recover possession from the widow so long as any portion of the dower remained unsatisfied, nor to mesne profits, his proper course was to bring a suit for an account of what was due as dower, and to pray that in satisfaction of that amount he might be put into possession of his share of the estate.[1]

Limitation does not run against *deferred* dower until it has become due, either by the death of one of the parties or by divorce. The *prompt* or *exigible* dower, however, is a debt always due, and demandable during "the subsistence of the marriage, and certainly payable on demand." On a clear and unambiguous demand for payment of dower by the wife, and its refusal by the husband, it has been held by the Judicial Committee of the Privy Council that a cause of action accrues, against which limitation would begin to run. When there has been no explicit demand on the wife's part, limitation will not affect her claim with reference to the *exigible* dower. The wife has an absolute option to demand the *mahr* during the lifetime of her husband, and to elect her own time for demanding it.[2] Limitation.

If the widow was in possession of her husband's property as security for her dower, and was subsequently thrown out of possession, the cause of action in respect of the dower must be deemed to have arisen at the time when she was ejected.[3]

Shares of dower when received by the legal inheritors thereof cease to be dower, and become part of the recipient's estate.[4]

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[1] *Balund Khan* v. *Janee*, 2 N. W., p. 319; *Ufzool Begum* v. *Ladlee Begum*, p 325; and *Imdad Hossein* v. *Hosseinee Baksh*, 2 N. W., p. 327.

[2] *Khajurunnissa* v. *Shifullah Khan*, 15 B. L. R., A. C., p. 306 See also *Khajurunnissa* v. *Raisunnissa*, 5 B. L. R., p. 84, where the claim was held to be barred. See also *Mullecka* v. *Jumeela*, 11 B. L. R., p. 375.

[3] *Soorma Khatoon* v. *Altafoonnissa Khatoon*, 2 Hay, p. 210.

[4] *Hosseinooddeen Chowdhry* v. *Tajunnissa Khatoon*, W. R., 1864, p. 199.

Wife may refuse to take up her abode in the conjugal domicil to enforce payment of the *prompt* dower.

A woman may refuse to take up her abode in the conjugal domicil without previous payment of the *prompt* dower.

The passage in the *Hedâya* bearing on this subject is as follows:—"It is the wife's right that she may deny herself to her husband until she receive the dower, and she may prevent him from taking her away (that is, travelling with her), so that her right in the return may be fixed in the same manner as that of her husband in the object of the return and become like sale. And it is not for the husband that he may prevent her from travelling or going out of his house and visiting her friends until he has paid the whole *exigible* dower, because the right of restraint is for securing fulfilment (of his right) to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment (himself); and if the whole dower is *deferred*, it is not for her to deny herself because of her having dropped her right by deferring it, as in sale. And in this matter Abû Yusuf holds the contrary opinion. And if the husband has retired with her, the same would be the answer according to Abû Hanîfa: but the two Disciples have said she has not the right to deny herself, and the difference of opinion subsists where there is retirement with her consent; but if she was forced, or an infant, or insane, her right of denying herself does not drop according to the unanimous opinion of our doctors."

The passage in the *Durr-ul-Mukhtâr* on the same subject runs as follows:—"It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her, even though after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. The right is for the purpose of obtaining what has been stated as *prompt* dower, whether wholly or partly."

In the *Fatâwa Kâzi Khân*, the law is stated thus:—"A wife, having surrendered herself to her husband before the fulfilment (*i.e.*, payment) of dower, subsequently denies herself (to him) for securing fulfilment of the dower. She has this right in the opinion of Abû Hanîfa; but Imâm Abû Yusuf and Imâm Mohammed maintain that she has not the right of prohibiting him from connubial intercourse, and doubts have arisen in regard to their opinions as to the power of preventing her from journeying. And,

according to the opinion of Abu'l Kâsim as-Saffâr, it is her right that she may prevent him from taking her on a journey."

The *Fatâwa Alamgiri* says:—"In all places, when the husband has had connubial intercourse with his wife, or validly retired with her, the whole dower is confirmed. If she intends to deny herself to him for securing fulfilment (*i.e.*, payment) of her *exigible* dower, it is her right to do so according to Imâm Abû Hanîfa; but this is opposed to the opinions of his two Disciples; and, in like manner, the husband cannot prevent her from going out or travelling or going on a voluntary pilgrimage, according to Abû Hanîfa, except when she goes out in an indecent manner. As to her right to all this before consummation, there is unanimity of opinion, as there is as to the rule when the husband has had connubial intercourse with her or 'retired' with her, with her consent, it is her right to refuse herself to go on a journey until payment of her whole dower according to the written engagement, or the *prompt* part of it according to the custom of our country. This view is according to Abû Hanîfa, but his two Disciples maintain that she has no such right, and the *Shaikh-ul-Imâm*, the jurisconsult, the pious Abu'l Kâsim as-Saffâr, was accustomed to decide according to Abû Hanîfa, so far as going on a journey is concerned; but in the matter of refusing herself, he used to decide according to the opinions of the two Disciples, and several of our learned doctors have approved of this distinction." Difference of opinion.

The text of the *Tanwîr-ul-Absâr* on this point is as follows:—"The woman can refuse to accompany her husband on travel or to cohabit with him until payment of her *prompt* dower, even though the refusal takes place after there has been a valid retirement or [previous] cohabitation with her consent . . . ."[1]

The comment of the author of the *Rudd-ul-Muhtâr* on this passage runs thus:—"... Similarly, if he [the husband] has cohabited [with his wife] by force, or against her will, or if the woman is a minor or insane (*majnûna*), and after that the woman were to refuse to accompany him on travel [or to cohabit with him] she would be entitled to do so, and this is by *consensus*. But if cohabitation had taken place with her consent, and after that she refused cohabitation on account [of the non-payment] of the [*prompt*]

[1] *Radd-ul-Muhtâr*, Vol. II, p. 587.

dower, according to the two Disciples she has no right to do so, and if she does, she would be called a *nâshiza*, and would not be entitled to her maintenance, unless the refusal takes place in the husband's house, she would then be entitled to her maintenance."[1]

And again, "it is lawful for the woman," says the *Tanwîr-ul-Absâr*, "to refuse cohabitation in order to exact payment of the dower or that portion of it which is payable immediately."

On this passage the author of the *Radd-ul-Muhtâr* comments as follows: "... If the husband has paid the [prompt] dower to the wife, but one *dirhem* is owing, for that even the woman can refuse cohabitation..... Similarly, it is stated in the *Hindièh* [*Fatâwa Alamgiri*] from the *Sirâj-ul-Wahâj* and in the *Bahr-ur-Râik* from the *Muhît*. And if the woman has assigned the dower to somebody, she may refuse cohabitation until it has been delivered to her assignee, but not if the assignment has been made to the husband himself."

In these passages the right is *not* restricted to such women only with whom there has been no previous cohabitation. The right of refusal is mentioned in general terms; and though the opinion of the two Disciples is given, it is only regarding the question of maintenance. There is nothing to warrant the suggestion that the woman whose *prompt* dower remains unpaid but who has once cohabited with her husband may be compelled to cohabit against her will, if she refuses cohabitation in order to exact payment of such dower.

Edan v. Mazhar Hossain.

This view was taken by the Allahabad High Court in the case of *Edan* v. *Mazhar Hossain*,[2] where the Judges held that in a suit by the husband to enforce his conjugal rights, the wife was entitled to refuse to cohabit with him until he had paid her dower, and that she was not precluded from doing so by the mere fact of having consented to cohabit with him since the marriage.

Wilayat Hussain v. Allah Rakhi.

In *Wilayat Hussain* v. *Allah Rakhi*[3] also, the same Court pronounced that a Mahommedan husband could not, according to Mahommedan Law, maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is *prompt* and has not been paid.

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 587. [2] I. L., 1 All., p. 483.
[3] I. L., 2 All., p. 831.

The same view was enunciated in *Nasrat Husain* v. *Hamidan* where the learned Judges held that a woman belonging to the Sunni sect married to a Shiah was entitled to the privileges secured to her married position by the law of her sect, and that she did not by the mere fact of the marriage become governed by the Shiah Law, and that, consequently, where a husband sued to recover his wife, the one being a Shiah and the other a Sunni, the wife's dower being *exigible* and not having been paid, the suit was not maintainable under the Sunni Law.[1] *Nasrat Husain v. Hamidan.*

But in *Abdul Kadir* v. *Salima*,[2] the same Court took a totally different view of the law and enunciated propositions for some of which at least there is no authority in the Mahommedan Law. *Abdul Kadir v. Salima.*

They seem to have thought that the right of a wife to resist her husband so long as the dower remains unpaid was analogous to the lien of a vendor upon the goods sold while they remained in his possession, and so long as the price or any part of it was unpaid; and that her surrender to her husband resembled the delivery of the goods to the vendee; that the lien for unpaid dower ceased to exist after consummation, unless at such time the wife was a minor or insane, or had been forced, in which case her father might refuse to surrender her until payment; and that it could not in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; for, they added, it could only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as *prompt*, in accordance with the principle recognised by Courts of Equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim. And they proceeded to lay down a general rule of interpretation, for which there seems to be no authority whatever, that "in cases of difference of opinion amongst the jurisconsults, Imâm Abû Hanîfa and his two Disciples, Imâm Abû Yusuf and Imâm Mohammed, the opinion of the majority must be followed." As I have already shown, in many cases *Fatwas* are delivered in accordance with the opinion of one only.

[1] I. L., 4 All., p. 205.

[2] I. L., 8 All., p. 149.

This case, which has revolutionised the practice of the Allahabad High Court, has since been followed by the Madras High Court.[1]

Shiah doctrine.

There are two opinions among the Shiahs, but the prevalent doctrine is that, when a woman has once cohabited with her husband, she cannot subsequently refuse him conjugal rights on the ground of the non-payment of the *exigible mahr*,[2] though she may sue her husband for it at any time during his lifetime.

When the husband settles on the wife any property in exchange for the dower, or, to use the language of the *Fatâwa Alamgiri* "sells her a chattel for her dower," she may, similarly, refuse cohabitation until such chattel or such property has been delivered to her.

When the property settled on the wife is lost before delivery, or a claim is established by a third person with reference to it, the husband is bound to give her a property of equal value. If the property settled be of inferior value than was alleged, the wife may, before consummation, insist on compensation or a change of the property. After the marriage has been consummated, she is supposed to have waived her right to compensation.

Transfer by the husband to the wife.

Under the Mahommedan Law, a wife is perfectly competent to deal with her husband, and, consequently, a transfer by the husband to the wife of any property belonging to him in lieu of her dower, is valid and operative. And even, if the husband be indebted at the time, or execution may have issued against him, at the instance of other creditors, the assignment would be valid, when she is not cognisant of any fraudulent intent on his part that the conveyance was to delay or defraud such creditors, or that he had no other property from which the debts may be satisfied.

Section 53 of the Transfer of Property Act which is borrowed from 13 Eliz., cap. 5, and 27 Eliz., cap. 4, avoids transfers when the transferor and transferee both act with a fraudulent intent. When the transferee takes in good faith for not a wholly incommensurate or a grossly inadequate consideration, the transfer is valid.[3]

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[1] I. L., 11 Mad., p. 327.

[2] *Jâmaa-ush-Shittât.*

[3] See on this subject, *Copis* v. *Middleton*, 2 Madd., p. 410; *Middleton* v *Pollock*, 2 Ch. D, p. 108; *In re Johnson. Golden* v. *Gillian*, 20 Ch. D., p. 191; *Bayspoole* v. *Collins*, 18 W. R., p. 730; *Wood* v. *Dixie*, 7 Q. B., p. 892; *Kevan* v. *Crawford*, 6 Ch. D., p. 29.

A woman is entitled to assign her dower-debt to any one she likes, and the assignee, if authorised to that effect, is entitled to recover the same from the husband.

She can also appoint an agent to recover her dower-debt from the husband.

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Miscellaneous Principles Concerning Ante-nuptial Settlements.

We have seen already that, in pre-Islâmic times, it was an essential condition to the validity of a marriage, that the husband should settle on the wife a certain dower, which became her exclusive property. Such at least was the established custom, though owing to the absence of an organised system of law or justice, the custom was often more honoured in its breach than in its observance.

From contemporary records, it would appear that the Arab husbands, in spite of the qualified custom which prevailed among the tribes, frequently despoiled their wives, and turned them adrift on the world absolutely helpless and without means. These acts of injustice were expressly forbidden by the Koranic teachings. It was declared to the Arabs, "If you separate yourself from your wives, send them away with generosity; it is not permitted to you to appropriate the goods you have once given to them."[1]

The Jewish tribes settled in Arabia followed a different system. Among them, both the dower and the property which the wife brought with her remained in the hands of the husbands until the dissolution of the contract.[2]

The Mussulman Law accepted in this matter the more liberal principle of the pre-Islâmic Arab customs. There is no community of goods under the Islâmic system between husband and wife. She is absolute owner of her own property and whatever the husband settles on her as dower. The terms of the settlement are agreed to before marriage, but when these have been omitted they may be settled subsequently. The terms of the contract may be varied at any time during the continuance of the marriage by mutual consent of the parties. The wife has the power either to relinquish the whole dower-debt, or make an abatement in her husband's favour; whilst the husband, similarly, has the power of making additions to her settlement or dower.

Dower may be increased after marriage.

[1] Koran, chap. ii, v. 229.

[2] *Code Rabbinique*, Ebn Haezer, Vol. II, pp. 10, 88 and 154.

The amount of the dower, as already pointed out, is either settled by the contract of marriage or by custom, or, in the case of *tafwîz* or *tahkîm*, by a subsequent agreement between the parties, or by an order of the Judge, or arbitrators.

When the dower has been specified in the deed of marriage, and where the language of the document is precise and clear, no difficulty can possibly arise. When the terms are vague, obscure, or contradictory, the *Hâkim* has to interpret them by a reference to the *presumed intention* of the parties, although the jurists have attempted to cast a light on the subject by framing certain somewhat arbitrary rules to regulate the mode of interpretation in such cases. For instance, Abû Yusuf says, that when a man is possessed of two things of unequal value, and settles upon his wife one of them, without sufficiently specifying which one is intended, the woman will be entitled to the article which is of the lesser value.[1] In the same way he holds that where a man settles on his wife a certain chattel the nature of which is described, but not the value, she is entitled to a chattel of medium value.

Shâfeï thinks that in such a case the customary dower should be accorded to the wife.[2]

When a man settles thirty *dînârs* on his wife, and declares in the marriage contract that ten *dînârs* shall be considered *prompt*, and ten *deferred*, it has been held that twenty *dînârs* shall be taken as the stipulated dower.

When the specific contract is admitted on both sides, little or no difficulty arises on the adjudication or readjustment of any question concerning dower, arising either during the lifetime of the parties or after their decease. When, however, one of the parties denies the execution of the contract, or alleges that it was obtained by force or fraud, or when it is stated that the contract entered into at the time of marriage has been modified or substituted for another, the question of dower becomes involved in difficulty, and it is necessary to consider the rules adopted by the Mussulman jurists for the settlement of disputes regarding the *mahr*.

The *Kifâya* says: "Disputes regarding the dower may take place between the married parties themselves in their lifetime, or between their heirs when both are dead, or, after the death of one of them,

[1] *Hedâya*, Vol. I, p. 139.

[2] *Ibid*, p. 141.

between his or her heirs and the survivor. When the disputes arise in the lifetime of the parties, it must be either before or after divorce ; and in all cases, the disputes may relate either to the amount of the specified dower, or to the fact of any dower having been specified in the contract."[1]

As we have stated before, it is not necessary that the contract of marriage should be reduced to writing, and the *Fatâwa Alamgiri* goes so far as to say that, "if a husband refuse to give a writing for the dower, he may not be compelled to do so."[2] A verbal contract of marriage and a verbal undertaking for dower are as valid in law as a written contract. Verbal contract for dower valid.

As it is now customary, in most civilised Mussulman communities, to reduce into writing the terms of a marriage-contract, prior to the celebration of the marriage, the instances of "the disputes relating to dower," given by the older jurists, possess less interest than was the case in early times. They are not, however, entirely without value, for, in India, dower frequently depends upon a mere verbal stipulation between husband and wife.

When the contract of marriage is embodied in writing, which mentions specifically the amount of dower settled on the wife, the husband cannot disavow it and allege that he did not intend to make the settlement in question, but something totally different, unless he avers that the amount entered in the deed was done fraudulently.[3]

When there is no written contract and "a dispute arises between the married parties at any time during their marriage regarding the amount of dower," the *mahr-ul-misl* of the woman must be taken as the standard by which the respective allegations of the husband and the wife are to be tested.

For example, if the wife were to allege that a sum of £500 was settled on her, and the husband were to say that £250 only was so fixed, it must be ascertained what the woman's customary dower would be. If it be not less than £500, the probability would be that the allegation of the wife accorded with fact.[4]

The same principle would be adopted, in case the dispute arose subsequently to the death of one or both of the parties, that is, Dispute about dowers.

[1] *Kifâya*, Vol. I, p. 86.
[2] *Fatâwa Alamgiri*, Vol. I. p. 454.
[3] *Ibid*, p. 454 ; *Jâmaa-ush-Shittât*.
[4] *Ibid*, p. 441.

where it is impossible to ascertain what the exact dower is, the wife or her heirs, as the case may be, should be held entitled to the customary dower or *mahr-ul-misl*.[1]

This, however, refers to cases where no proof is obtainable on either side as to the amount of dower settled at the time of marriage. When a woman can establish presumptive grounds for coming to a different conclusion, and for holding that she is entitled to more than her *mahr-ul-misl*, she is not debarred from doing so.

The Court of Algiers enforced this principle in a case reported by M. Sautayra. A person died leaving three widows, two of whom established conclusively their right to dower. The third could offer no proof, but there was nothing to indicate that the amount of her dower was less than those of the two first wives. The Court held with the Kâzi, who decided the case in the first instance, that she was entitled to the same *sadâk* as the others.

When the amount of dower is entered in writing, but the husband alleges that it was obtained by force or fraud, the onus of proving this rests on him. When an allegation is made on behalf of the wife, that she was married in consideration of a higher dower than that actually entered in the writing, the burden of proving it would be thrown on her.

Cases frequently occur where a marriage is contracted privately, and verbally, for a small amount of dower, whilst a much larger amount is stated before the public, or entered in the deeds of marriage. It has been held that the amount publicly stated or entered in writing should be considered the legitimate dower.[2]

When a *wakîl* or mandatary accepts a commission to arrange a contract of marriage and to stipulate for a certain dower, if he should exceed his authority and fraudulently increase the dower, the husband would be only liable for it if he should have had any suspicion of the fraud before he consummated the marriage. If, before consummation, the woman knew of the fraud of the husband's agent, she would be entitled only to the sum for which the authority was actually given. If both parties were aware of the fraud, then the husband would be liable for the whole amount.

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[1] *Fatâwa Alamgiri*, Vol. I, pp. 451, 452; *Jâmaa-ush-Shittât*.

[2] *Ibid*, p. 448; *Jâmaa-ush-Shittât*; see the cases in 1 S. D. A. Rep., p. 279, and 2 S. D. A. Rep., p. 199 (Calcutta).

When it is alleged that the first contract has been modified by a subsequent one, the onus rests on the party making the allegation.[1]

When a dower is specifically mentioned in the contract of marriage, and the husband separates from or divorces his wife before consummation, the wife is entitled to a moiety of the dower.[2]

A woman is not entitled to any dower in the following cases *provided the separation takes place before consummation :—*

(*a*) When two minors contract themselves in marriage without the consent of their guardians, and the marriage is cancelled at the instance of the latter.

(*b*) When a marriage contracted *for* minors is cancelled by them in exercise of their right of option.[3]

(*c*) When the marriage is cancelled by order of the Judge, for any cause which gives a right of option to the parties.[4]

(*d*) When a man enters into a contract of marriage whilst labouring under an illness which comes within the meaning of death-illness, and dies from that illness before consummating the marriage. Marriage contracted in death-illness.

If the wife, however, was suffering from some illness at the time of marriage which prevented consummation and eventually caused her death, her right to the dower would be transmitted to her heirs.

If a father were to contract his minor son in marriage for a certain dower, and the son were to die without leaving any property, the father would be liable to the wife for such dower.[5]

As we have already seen, the husband has the power of making an addition to the dower during the subsistence of the marriage, just as the wife may make an abatement. Among the Shâfeïs, such addition is regarded as a *gift*, and, as under the Mahommedan Law, no gift is valid without siesin, any addition made by the husband to the dower requires that delivery thereof should be made at the time to the wife.

Among the Hanafïs and the Shiahs, the *addition* is not regarded in the light of a *gift* or *hiba*, and does not therefore require delivery of siesin, at the time the addition is made, to render it valid. "It is," says the *Hedâya*, "an alteration of the terms of the

[1] Mohammed Assem, *Traité de Mariage*, traduction par Burdon Lasalle, ch. ii.

[2] See Chapter on *Marriage*.

[3] See *Ibid.*

[4] See *Ibid.*

[5] *Jâmaa-ush-Shittât.*

contract in a non-essential matter within the power of the parties, and, like an addition to the price in sale, becomes incorporated with the original dower."[1]

When a separation takes place before consummation the wife is not entitled to the benefit of any post-nuptial settlement, or "additions made to dower after marriage."

The *paraphernalia.*

The *trousseaux* of a bride is provided by her father. How far he has a right to recover any money he has expended on it from the dower of his daughter, depends upon the customs prevalent in the community where the question arises. For example, in Algeria it has been held that the father is not bound to provide his daughter's *trousseaux*, and if he should do so he may recoup himself from the dower which she receives on marriage. In India, the bride's father is bound to furnish her with a wedding outfit, unless he is in straitened circumstances, when the obligation rests with the husband. When a man advances a sum of money towards the *trousseaux* of his future wife,[2] it is obligatory on the father, if he be possessed of means, to do the same or contribute such an amount as is customary.[3] The *paraphernalia*, which a bride brings with her from her father's home, is called *jahâz* (or *jahêz*), and remains her absolute property and *peculium* over which the husband has no control. The marriage outfit provided by the bridegroom becomes, likewise, her exclusive property.

The expenses of the marriage feast are defrayed by the bridegroom. The wife has to contribute nothing towards the support of the household.

The property of the married parties is always distinct. Originally, and at the commencement of the married life, it is easy to distinguish which part of it belongs exclusively to the wife and which to the husband. Later, and after the husband and wife have lived together in one conjugal domicil, it becomes difficult to distinguish the property of the one from the property of the other. Should a dispute then arise between the parties, or, after their decease, between their respective heirs, regarding the household

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[1] *Hedâya*, Vol. I, p. 127, and *Hedâya*, Vol. II, p 485. Comp. the *Kanz-ud-Dakâik*.

[2] This is called the *Dast-i-pymân*.

[3] *Jâmaa-ush-Shittât*; *Muhît*. "The proper ratio of *Jahâz*," says the *Fatâwa*, "is that for every *dinâr* of the *dast-i-pymân* there should be three or four *dinârs* of the *Jahâz*."

effects of the common domicil, then, in the absence of any direct proof, the presumption of law is that the "things which by custom appertain to women" will be considered as the wife's property, and those "which appertain to men" will be the husband's. The right to what is appropriate to *both* will be decided with reference to local usage or custom.[1]

According to the *Radd-ul-Muhtâr*, a man may recover the value of the presents sent by him to the person whom he proposed to marry if the negociations are broken off, and no marriage takes place; though, according to the *Durr-ul-Mukhtâr*, he can only recover such things as are still existing in specie.

If a father were to give articles of *jahâz* to his daughter, he is not entitled to recover them or their price, and on this is the *Fatwa*.

If a father belongs to the class of people called *ashrâf*, his allegation that the things sent with the girl were only lent will not be accepted, the presumption in such families being that they form part of the *paraphernalia*.

Every *paraphernal* article belongs to the woman, in case of separation between husband and wife.

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[1] According to Abû Hanîfa, whose views have been enforced in several cases by the Hanafî Kâzi of Algiers, "everything which is regarded as having been necessary or useful to the household (tout ce qui est regardé comme ayant été nécessaire ou utile au ménage commun) belongs to the survivor." Comp. the *Fatâwa Kâzi Khân* on this point.

CHAPTER XII.

DISSOLUTION OF THE MARRIAGE-CONTRACT.—PRE-ISLAMIC INSTITUTIONS.—TALAK.—DIFFERENCES AMONG THE SCHOOLS.

Section I.

General Observations.

Among all the nations of antiquity the power of divorce was regarded as a natural corollary to the marital right. Originally, this power was exclusively vested in the husband, and the wife was under no circumstance entitled to claim a divorce.

The progress of civilisation and the advancement of ideas led to a partial amelioration in the condition of women. They, too, acquired a qualified right of divorce, which they were never backward in exercising freely, until the facility with which marriages were contracted and dissolved under the Roman emperors passed into a by-word.

Under the ancient Hebraic Law, a husband could divorce his wife for any cause which made her disagreeable to him, and there were few or no checks to his arbitrary and capricious use of this power.

Among the Athenians as well as the early Romans, the husband's right to repudiate the wife was as unrestricted as among the ancient Israelites.

In later times, amongst the Hebrews, the Shammaites, to some extent, modified the custom of divorce by imposing certain restrictions on its exercise, but the school of Hillel upheld the law in its primitive strictness.

At the time of the Prophet's appearance, the Hillelite doctrines were chiefly in force among the Jewish tribes of Arabia, and repudiations by the husbands were as common among them as among the pagan Arabs.

In some few exceptional cases, both among the Arabs and the Jews, the women of noble families would, before marriage, reserve to themselves the power of divorcing their husbands; and when they exercised the faculty reserved for them, they announced the separation by merely changing the position of their tents, which conveyed a sufficient intimation of the fact to the repudiated husbands.[1]

The reforms of Mohammed marked a new departure in the history of Eastern legislation. He restrained the power of divorce possessed by the husbands; he gave to the women the right of obtaining a separation on reasonable grounds; and towards the end of his life he went so far as practically to forbid its exercise by the men without the intervention of arbiters or a judge. He pronounced "*talâk* to be the most detestable before God of all permitted things,"[2] for it prevented conjugal happiness and interfered with the proper bringing up of children. The permission, therefore, in the Koran, though it gave a certain countenance to the old customs, has to be read with the light of the Lawgiver's own words. When it is borne in mind how intimately law and religion are connected in the Islâmic system, it will be easy to understand the bearing of the words on the institution of divorce.

Naturally, therefore, great divergence exists among the various schools regarding the exercise of the power of divorce by the husband of his own motion and without the intervention of the Judge. A large and influential body of jurists regard *talâk* emanating from the husband as really prohibited except for necessity, such as the adultery of the wife.[3] Another section, consisting chiefly of the Mutazalas, consider *talâk* as not permissible or lawful without the sanction of the Hâkim-ush-sharaa. Mutazalas.

They consider that any such cause as may justify separation and remove *talâk* from the category of being *forbidden* (ممنوع, *mamnû*), should be tested by an unbiassed Judge; and, in support of their doctrine, they refer to the words of the Prophet already cited, and his direction that in case of dispute between the married parties, arbiters should be appointed for the settlement of their differences.

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[1] Perron, *Femmes Arabes*.

[2] ابغض الحلال الى الله عزوجل الطلاق reported by Abû Daûd; see the *Radd ul-Muhtâr*, Vol. II, p. 682.

[3] *Ibid*, p. 682.

The Hanafîs, the Mâlikîs, the Shâfeïs and the bulk of the Shiahs hold *talâk* to be *permitted* (مُبَاح *mubâh*), though they regard the exercise of the power without any cause to be unlawful.

The *Radd-ul-Muhtâr*, after stating the arguments against the proposition that *talâk* is unlawful, proceeds to say: "No doubt, it is forbidden, but it becomes *mubâh* for certain outside reason, and this is the meaning of those jurists who hold that it is really forbidden.[1] And its being *mubâh* arises from the necessity of release (from the marital tie) in certain cases. Therefore, when there is no reason whatsoever, there is no necessity for release; and if *talâk* is given without any reason, that is stupidity and ingratitude to God, and the giving of unnecessary and gratuitous trouble to the woman and her family and the children . . . . If there is no legal cause for *talâk*, such as would render it *mubâh*, then it must be considered unlawful; for God says [in the Koran] that if your women are obedient to you, you must not seek separation from them."[2]

The author of the *Multeka* (Ibrâhîm Halebî) is more concise. He says: "The law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no Mussulman can justify a divorce either in the eyes of religion or the law. If he abandon his wife or put her away from simple caprice, he draws upon himself the divine anger, for 'The curse of God,' said the Prophet, 'rests on him who repudiates his wife capriciously.'"[3]

"*Talâk* is permitted only when the wife by her conduct or her words does injury to the husband or happens to be impious." . . "And it is *wâjib* (obligatory) when the husband cannot fulfil his duties, as when he is impotent or an eunuch."[4]

The pre-Islâmic institution of divorce required no formula to make its action valid, and as there was no check on the irresponsible power of the husband, a simple intimation from him to the effect that the tie was dissolved was considered sufficient.

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[1] Kamâluddîn ibn Himâm is one of the jurists who holds it forbidden, but allowed only in cases of necessity.

[2] *Radd-ul-Muhtâr*, Vol. II, pp. 682, 683.

[3] Comp. D'Ohsson, Vol. III, p. 79.

[4] *Radd-ul-Muhtâr*, Vol. II, p. 683.

Even among the schools which recognise the validity of a divorce without the intervention of any judicial authority there are several conditions imposed on the exercise of the faculty by the husbands, with the object of protecting women as much as possible from being thrown on the world at the mere caprice of the man. They also give to the woman the right of dissolving the contract under certain circumstances.

When the dissolution of the marriage-tie proceeds from the husband, it is called *talâk*. Technically, the power of the husband is greater than that of the wife ; but, virtually and in practice, it is restrained within reasonable bounds by the numerous formulæ which are attached to its exercise.

When it takes place at the instance of the wife, it is called *khulâ*.

When it is by mutual consent, it is called *mubârât*.

In all these cases, according to these schools, no decree of the Judge is necessary to dissolve the union. The mere act of the parties is sufficient in law, provided all the conditions required for effecting a valid divorce are complied with. Hanafî, Shâfoï, Mâliki and Shiah doctrines.

There are other cases, however, in which the Judge is authorised to dissolve or cancel the union, on the application of either the husband or the wife.

SECTION II.

TALAK.

Two kinds of *talâk* are recognised by the Hanafîs, *viz.* (1), the *talâk-us-sunnat*, and (2), the *talâk-ul-bidaat* or *talâk-ul-badai*. The *talâk-us-sunnat* is the divorce which is effected in accordance with the rules laid down in the traditions (the *sunnat*) handed down from the Prophet or his principal disciples. It is, in fact, the mode or procedure which seems to have been approved of by him in the beginning of his Ministry, and is, consequently, regarded as the regular or proper and orthodox form of divorce. Hanafî doctrines.

The *talâk-ul-bidaat*, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Mahommedan era. It was then that the Ommeyyade tyrants, finding the checks imposed by the Prophet on the facility of repudiation galling, looked about for some escape from the strictness of the law, and found in the pliability of the jurists a loophole.

As a matter of fact, the capricious and irregular exercise of the power of divorce which was in the beginning left to the husbands was strongly disapproved of by the Prophet. It is reported that when once news was brought to him that one of his disciples had divorced his wife, pronouncing the three *talâks* at one and the same time, the Prophet stood up in anger on his carpet and declared that the man was making a plaything of the words of God, and made him take back his wife.[1]

The Shiahs and the Mâlikîs do not recognise the validity of the *talâk-ul-bidaat*, whilst the Hanafîs and the Shâfeïs agree in holding that a divorce is effective, if pronounced in the *bidaat* form, "though in its commission the man incurs a sin."

Talâk-us-sunnat; Ahsan form.

The *talâk-us-sunnat* is either *ahsan* or *hasan—very proper* or *simply proper*. In the *talâk-us-sunnat* pronounced in the *ahsan* form, the husband is required to submit to the following conditions, *viz.* (1), he must pronounce the formula of divorce *once, in a single* sentence ; (2) he must do so when the woman is in a state of purity (*tahr*), and there is no bar to connubial intercourse nor has there been any during that state ; and (3) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three *tahrs*. This latter clause is intended to demonstrate that the resolve, on the husband's part to separate from the wife, is not a passing whim, but is the result of a settled determination. On the lapse of the term of three *tahrs*, the separation takes effect as an irreversible divorce.

"It is proper and right to observe this form," says the *Radd-ul-Muhtâr*, "for human nature (*nafs*) is apt to be misled and to lead astray the mind and to perceive faults which may not exist, and to commit mistakes of which one is certain to feel ashamed afterwards."[2]

Hasan form.

In the *hasan* form, the husband is required to pronounce the formula three times during three successive *tahrs*, namely three periods of purity of the wife. When the last formula is pronounced the *talâk* or divorce becomes irreversible.[3] These two forms alone, as stated before, are recognised by the Shiahs.[4]

Talâk-ul-bidaat.

In the *talâk-ul-bidaat*, the husband may pronounce the three

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 684.

[2] *Ibid*, pp 683, 684.

[3] *Fatâwa Alamgiri*, Vol. I, p. 492.

[4] *Sharâya ; Mafâtîh ; Jâmaa-ush-Shit'ât.*

formulæ at one time, whether the wife is in a state of *tahr* or not. The separation then takes effect definitely after the woman has fulfilled her *iddat*.

All these schools allow recantation ; that is, a husband who has suddenly and under inexplicable circumstances pronounced the formula against his wife, may recant any time before the three *tahrs* have expired. When the power of recantation is lost, the separation or *talâk* becomes *bâin;* whilst it continues, the *talâk* is simply *rajai* or reversible.

Talâk-ul-bâin.

When a definitive and complete separation (*talâk-ul-bâin*) has taken place, the parties so separated cannot re-marry without the formality of the woman marrying another man and being divorced from him, as mentioned before.[1]

Sautayra and Sédillot[2] agree with the Mohammedan jurists in thinking, that this rule was framed with the object of restraining the frequency of divorce in Arabia. Sédillot speaks of the condition as "a very wise one," as it rendered separation more rare, by imposing a check on its frequent practice among the Hebrews and the heathen Arabs of the Peninsula. Sautayra says that the check was intended to control a jealous, sensitive, but half-cultured race by appealing to their sense of honour.[3]

Difference between the Sunni and Shiah rules.

As a general rule, the power of *talâk* under the Sunni doctrines is larger than under the Shiah Law. "Marriage," says the *Sharâya*, "being an act of chastity favoured by the law, and in its action not admitting of dissolution, it is necessary in taking off or removing the tie to adhere strictly to the terms of legal permission," *i.e.*, the formalities imposed by the law."[4]

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[1] *See ante p.* 324.

[2] Sédillot, *Hist. des Arabes*, p 85 ; comp. Syud Ahmed Khân's Ess., iv. p. 14.

[3] Sultan Khudâ Bendèh Uljâitu Khan's conversion to the Shiah doctrines is ascribed to his unwillingness to allow his wife, from whom he had separated in a fit of passion by an irregular divorce, to submit to the ordeal of a marriage with another. Certain rationalistic schools, notably that of the Mutazalas, think that the following passage of the Koran abrogates the condition laid down in the verse immediately preceding it: "When ye divorce women," says the passage referred to, "and the time for sending them away is come, either retain them with generosity or send them away with generosity; but retain them not by constraint so as to be unjust towards them." Comp. also the *Bihâr-ul-Anuâr* and the *Mishkât in loco*. They also hold that no dissolution of the marriage is valid without the sanction of the Hâkim-ush-sharaa.

[4] *Sharâya*, p. 314.

The conditions, which surround the power of *talâk* under the Shiah Law, and limit its exercise, are accordingly stricter and far more rigid than under the Sunni Law.

According to the Sunni doctrines, *talâk* may be effected *expressly*, in terms which leave no doubt as to the intention of the repudiator (*sarîh*), or by the use of ambiguous or implicative expressions (*bil-kinâyèh*).[1]

The *Radd-ul-Muhtâr* says that when expressions are used which are *sarîh* or which are analogous thereto, the intention of *talâk* is not necessary on the part of the husband. For example, if a man were to use the word *talâk*, it would not be necessary to see whether he intended to divorce the wife.

Shiah doctrine. According to the Shiahs, repudiation pronounced "implicatively," or in ambiguous terms, does not take effect, whether there be intention on the part of the repudiator or not, nor does it take effect if it be made dependent upon or subjected to any condition.[2]

Besides the divergence existing between the Shiahs and the Hanafîs regarding express and implied *talâks*, there is a marked difference between the two schools in respect of the *capacity* for repudiation. The Shiahs hold that, in order to pronounce a valid *talâk*, the repudiator must not only be "adult and sane," but must act of his own free will, and with the knowledge and a comprehension of the nature of what he is doing.

The Sunnis, generally speaking, regard a repudiation pronounced by a person who is *sui juris* as valid in law, without requiring him to fulfil any other conditions.

Section III.

Capacity of Talak.

Shiah doctrines. Under the Shiah Law there are four conditions essential to the *capacity* of pronouncing a valid *talâk*. It is required (1) that the husband should have attained majority; (2) that he should be sane and possessed of sound understanding; (3) that he should act of his own free will; and (4) that, on his part, there should be a distinct intention to dissolve the marriage tie.

[1] *Fatâwa Alamgiri*, Vol. I, p. 500; *Fatâwa Kâzi Khân*, Vol. II, p. 33; *Radd-ul-Muhtâr*, Vol. II, p. 685.

[2] *Jâmaa-ush-Shittât*; *Sharâya*, p. 314.

A boy, who has not arrived at the age of puberty, is precluded from effecting a dissolution of the matrimonial contract, by pronouncing the *talâk*, as also an insane person. There is, however, this difference between the case of a person who is a minor, and one who is disqualified by reason of insanity, that whereas the guardian of a minor husband has no authority to supply his ward's place in order to effect a valid repudiation, the guardian of a *confirmed* lunatic is authorised to do so. When the lunatic has no guardian, the Kâzi or Judge can make a decree to dissolve the tie. The reason of this difference consists in the fact that the disability of age is temporary, whereas lunacy is usually permanent. The difficulty, therefore, which was felt under the English Law, in the case of *Barker* v. *Barker*, where, the husband being insane, a divorce was sought by his Committee on the ground of the wife's adultery, cannot arise under the Shiah Law.

Repudiation under compulsion invalid. Shiah Law.

Repudiation pronounced under compulsion is invalid and ineffective under the Shiah Law. In order to invalidate a *talâk* on the ground of its having been pronounced under compulsion, three conditions are requisite: (1) that the "compeller" is able to do what he threatens; (2) that there is a strong probability of the threat being carried into effect; (3) that the threat involves some imminent and serious danger to the "compelled" person himself or to some one dear to him. "A trifling injury," says the *Sharâya*, "is not sufficient to establish compulsion."[1]

A repudiation obtained by fraud, or given under undue influence, is also invalid under the Shiah Law. Intention is a necessary element to the validity of all *talâks*. Where this essential condition is wanting, though the *talâk* may be pronounced in *express* terms, yet it has no effect.[2] But, even where there is actual intention, the repudiation must be formulated in *express* and *unequivocal* terms, or the entire proceeding would be invalid.

A *talâk* pronounced by a person in a state of intoxication, or by one labouring under a temporary stupor from the use of some narcotic, or any other cause, is likewise invalid. So also is the case of *talâks* given by mistake or inadvertence, in anger or in jest, or when the words have fallen whilst talking in sleep.[3]

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[1] *Shâraya*, Vol. I, p. 316; see the *Jâmaa-ush-Shittât*; *Irshâd-ul-Allâmah*.

[2] *Jâmaa-ush-Shittât*.

[3] *Ibid*; *Irshâd-ul-Allâmah*.

Hanafi doctrines.

Among the Hanafîs, the power of repudiation belongs in principle to every husband who is adult and sane. This power is certainly greater in the Hanafî than in any other Sunni school.

According to the Hanafî doctrines, "*talâk* pronounced by any husband who is of mature age (*bâligh*) and possessed of understanding (*aâkil*) is effective, whether he be free or a slave, willing or acting under compulsion ;[1] and even though it were uttered in sport or jest, or inadvertently by a mere *slip of the tongue*."[2] But he must be awake at the time when he pronounces the *talâk*.[3] Zailye, however, holds that the *talâk* of one acting under compulsion is not valid.[4]

An acknowledgment of *talâk*, *viz.*, an acknowledgment by a man that he had divorced his wife, extracted from a man by compulsion, is ineffective according to Kâzi Khân. Similarly, if he is made to sign a document of *talâk*.[5] Kâzi Khân also holds that a *talâk* given in jest is not effective, as is the case with an acknowledgment of *talâk* obtained by compulsion.[6]

The *Radd-ul-Muhtâr* says, an acknowledgment of *talâk* made in jest or falsely will take effect (*kazàan*) "judicially," though it will not have any force *in foro conscientiæ ;* in other words, the man is bound to retract, but if he does not the Kâzi will give effect to it.[7]

As regards the *talâk* of a man who is intoxicated there is great difference of opinion among the Sunnis.

Talâk by a drunken man.

If a man is forcibly made drunk and in that state *talâks* his wife, according to the *Tuhfa*, such a *talâk* will not take effect. And in the *Fath-ul-Kadîr* preference is given to this opinion. And this has been approved in the *Nahr-ul-Fâik*, and "it is correct." So in the *Sharh-ul-Jâmaa*, the *Khânièh*, *Tahtâwî* and *Ilâshiat-ul-Madani*.[8]

In Kahastâni it is stated from Zâhidi that, if a man is dead drunk and cannot distinguish between right and wrong, a *talâk* pronounced by him will not be effective. Imâm Shâfeï also has declared that the *talâk* of a drunken man is not valid. And this doctrine has been adopted by Tahâwî and al-Karkhi, and in the

[1] *Fatâwa Alamgiri*, Vol. I, p. 497 (after the *Jowharat-un-Nayyerèh*).
[2] *Ibid* (after the *Muhît*).
[3] *Radd-ul-Muhtâr*, Vol. II, p. 685.
[4] *Ibid*.
[5] *Ibid*, p. 691.
[6] *Ibid*, p. 694.
[7] *Ibid*, p. 691.
[8] *Ibid*, p. 696.

Tatâr-Khânièh it is stated that the *Fatwa* is thereon. Mohammed Ibn Sulma has followed the same doctrine, which was also the view of Imâm Zuffer.[1]

The weight of authority, therefore, seems to be in favour of the doctrine that a divorce pronounced by a person in a state of intoxication is invalid.

But, says the *Radd-ul-Muhtâr*, this view is contrary to the texts; and in the *Fatâwa Alamgiri* it is stated from the *Muhît* that the *talâk* of a drunken man is effective,[2] unless there are circumstances which destroy its effect. For example, if a man were to take something lawful *(hallâl)*, such as the extract of honey or the juice of aniseed, &c., and became inebriated, or if he were to take anything unlawful like opium or wine as a medicine, and should lose his consciousness thereby and were, whilst in that condition, to pronounce a *talâk*, it would not be effective.[3]

Accordingly, under the Hanafî doctrines as enunciated in the *Fatâwa Alamgiri*, a *talâk* pronounced by a man whilst in a state of intoxication is valid, unless the liquor or the drug which caused the intoxication, if unlawful, was administered against his will, or was taken "for a necessary purpose," *i.e.*, medicinally.[4]

Though Shâfeï himself seems to have held the opinion that the *talâk* of a drunken man was not effective,[5] his followers agree with the Hanafîs in holding, that a repudiation pronounced by a drunken man is effective subject to the limitations above stated.

Shiahs and the Mâlikîs.

The Mâlikîs, however, agree with the Shiahs in regarding such repudiations as absolutely invalid. The Mâlikî doctrine was laid down with great clearness and precision in a case decided by the Kâzi of Tlemcen in Algeria, and reported by Sautayra. In that case, the wife applied for a divorce against her husband, on the ground that he had pronounced a *talâk-ul-bâin* against her.

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 697.

[2] *Ibid*, p. 696, *et. seq.*

[3] *Ibid.*

[4] *Fatâwa Kâzi Khân*, p. 33. Abû Yusuf and Abû Hanîfa were of opinion that the divorce of a man who became intoxicated on fermented liquors obtained from grain or honey would not be effective. Imâm Mohammed, however, differed from them, and his view is in force among the Indian Hanafîs. The *talâk* of a person who is suffering from intoxication under the effects of *bhang* or *ganja* would be effective—*Fatâwa Alamgiri*, Vol. I, p. 498.

[5] *Hedâya*, Vol. I, p. 211; *Fatâwa Kâzi Khân*, Vol. II, p. 33.

The husband in defence stated that he was not aware of having pronounced a *talâk*, as at the time of the alleged repudiation he was in a state of intoxication. The witnesses cited by the parties proved that the *talâk* was actually pronounced, but that the husband was drunk at the time. The Kâzi dismissed the wife's petition, holding that the *talâk* was ineffective, as the man was in a state of inebriety when he uttered the formula constituting the basis of the charge.

Talâk extorted under compulsion. Hânafi doctrine.

There is great divergence among the several Sunni schools with reference to a repudiation obtained or extorted from an individual by compulsion, or under the influence of threats. The Hanafîs, as mentioned before, are of opinion that a *talâk* pronounced under compulsion is as valid as one given voluntarily.

Shâfeï and Shiah doctrine.

The Shâfeïs hold a diametrically opposite view. They agree with the Shiahs in considering that the husband who acts under the influence of threats of violence is not a free agent, and consequently his *talâk* has no validity in law. Shâfeï, the founder of the school, expressed this in terms which are given with some particularity in the *Hedâya*. He says: "That the *talâk* of a man acting under compulsion is not effective, because a person who is *compelled* has no option, and no formal act of law is worthy of regard, unless it be voluntary; contrary to the case of one speaking in jest, who, in mentioning divorce, acts from *option*, which is the cause of its validity."[1]

The answer of the Hanafî doctors to these pertinent remarks of, probably, the most rigid of all the Sunni jurists, is worthy of note. "Our doctors," says the author of the *Hedâya*, "allege that a person who is subjected to compulsion pronounces divorce under circumstances of complete competency [maturity of age and sanity of intellect], the result of which is that the divorce takes effect equally with that of a person who acts of his own free will. . . . . The reason for holding this is that the man [who acts under compulsion] has the choice of two evils—one, the thing with which he is threatened or compelled, and the other, the divorce under compulsion; and viewing both, he makes a choice of that which appears to him the easiest, namely, divorce, and this proves that he has an option."[2]

[1] *Hedâya*, Bk. iv, ch. i, Vol I.

[2] *Hedâya*, Vol. I, p. 149.

In the case of *Ibrahim Moolla* v. *Enayet ur-Rahman*, the High Court of Calcutta held that the divorce of one "acting under compulsion is effective."[1] The principle, however, enunciated in this judgment ought to be confined exclusively to the Hanafîs. *Ibrahim Moolla* v. *Enayet ur-Rahman.*

Supposing a Hanafî, under the influence of threats and strong coercion, pronounces a *talâk* against his wife, and on recovering his freedom of action, disavows the validity of his act, and places himself under the Shâfeï rules to escape from the results of the *talâk*, there can be little doubt that he would be justified in doing so, and the repudiation he had pronounced would be invalidated.

The Mâlikîs follow the same rule as the Shâfeïs. According to them, "the fear of punishment, the threat of death, violence, or imprisonment to the husband himself, or to anyone whom he holds dear, renders the repudiation ineffective."[2] Mâlikî doctrines.

As regards the character of the compulsion which is held to invalidate a *talâk*, the Mâlikîs and the Shâfeïs agree with the Shiahs in holding, that it must be such as to influence the conduct or frame of mind of a reasonable man.

All the Sunni jurists agree that the repudiation of a boy under puberty, though possessed of understanding, is ineffective.[3]

"If a youth under puberty should repudiate his wife, or another person should do so on his behalf, and the youth, on attaining majority, should ratify what was done while he was a minor, such ratification must be worded in the form of a repudiation *de novo*, and not simply as a confirmation of what had occurred previously."[4]

The *talâk* of one who is insane or afflicted by epilepsy, paralysis, or palsy is invalid. So also, if a person were to pronounce a repudiation, whilst asleep or unconscious (*madhûsh*) or lost in astonishment, no legal effect will be attached to it.[5]

Nor is the *talâk* of one, who has lost all control over himself through anger and does not know what he is saying or doing, effective.[6]

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[1] Weekly Reporter, p. 460.

[2] *Kitâb-ul-Anwâr.*

[3] *Fatâwa Alamgiri*, Vol. I, p. 498 (after the *Fath-ul-Kadîr*); *Kanz-ud-Dakâik.*

[4] *Ibid*; *Bahr-ur-Râik.*

[5] *Ibid*; *Kanz-ud-Dakâik*; *Fatâwa Kâzi Khân*, Vol. II, p. 29. *Radd-ul-Muhtâr*, Vol. II, p. 700.

[6] *Ibid.*

If a lunatic, with lucid intervals, should pronounce a *talâk* whilst the fit is on him, it would be ineffective; but it would be valid if given in a lucid interval.[1]

Talâk with an option.

Among the Sunnis, "a repudiation cannot be qualified by option." Thus, if a person were to say to his wife, "I have *talâked* you, but I reserve to myself an *option* for three days," the repudiation would be valid, but the option invalid. If a repudiation be pronounced conditionally, or be made dependent on the occurrence of a contingency not impossible in its nature, the condition is valid, the *talâk* taking effect only when the condition is fulfilled.

Shiah doctrines.

The Shiahs, on the other hand, regard all *talâks* to which an option or a condition is attached, as absolutely void.[2]

Talâk in writing.

They do not allow a *talâk* to be given in writing, nor in any other language than the Arabic, when there is ability to pronounce the words necessary for a valid repudiation; nor can a *talâk* be effected among them by signs unless the husband is dumb.[3] A person who is dumb may give the repudiation in writing, but one who is able to speak is not allowed to do so. Even an absent husband cannot effect a valid *talâk* in writing.[4] He must pronounce the words in the presence of the witnesses, and the fact of his doing so may be recorded in writing, which may be forwarded to the wife, or it may be intimated to her otherwise. The Sunnis, on the contrary, hold that "a *talâk* may be effected by writing as well as words."[5]

Hanafi doctrines.

Writings, among them, are said to be of two kinds, *viz.*, *marsûmah* (customary) and *ghair-marsûmah* (not customary). When repudiation is given by a writing of the description called customary, it is effective, even when there is no real intention on the part of the husband to divorce the wife. But where the writing, though *marsûmah*, is written so that it is not intelligible; or if it is written on something that cannot be deciphered, there will be no *talâk*, even if he had the intention.[6] In the case of non-customary writings, if

[1] *Fatâwa Alamgiri*, Vol. I, p. 498; *Kanz-ud-Dakâik; Fatâwa Kâzi Khân*, Vol. II, p. 29; *Radd-ul-Muhtâr*, Vol. II, p. 700. All these refer to the Sunni doctrines.

[2] *Jâmaa-ush-Shittât.*

[3] *Mafâtîh.*

[4] *Jâmaa-ush-Shittât.*

[5] *Fatâwa Alamgiri*, Vol. I, p. 499.

[6] *Radd-ul-Muhtâr*, Vol. II, p. 703.

there is any ambiguity, the *talâk* does not take effect; when there is no ambiguity and the meaning of the writer is "manifest," the repudiation is valid.[1]

It is not necessary for the husband himself to pronounce the *talâk* in the presence of the wife, but it is necessary that it should come to her knowledge.

If a *talâk* is given by letter, it will take effect on the receipt of the letter by the wife. If the letter reaches her father and he tears it to pieces, there will be no *talâk* unless the father transacts all her business,—is, in fact, her agent, and resides in the same place with her. If the father should inform the woman of the receipt of the letter and deliver to her the torn pieces thereof, the *talâk* will take effect only if the letter can be read and understood.[2]

A writing obtained from a husband by "beating and imprisonment" divorcing his wife is ineffective.

Under the Shiah Law, it is further necessary that there should be two reliable witnesses present at the time of repudiation to hear the words in which it is pronounced, or in the case of a dumb individual, to see the writing or the signs in which it is expressed. Not only must the witnesses be present at the time, but they should understand the nature of the act and hear the distinct wording of the repudiation. If they be unable to testify to the exact character of the *talâk*, or the words or signs used, it is invalid, although all other conditions may have been duly complied with. Shiah doctrines.

It is a further condition under the Shiah doctrines that the witnesses should be present *together*. The Shiah Law is so exact in the matter of repudiation, and throws so many obstacles in the way of a dissolution of marriage by this process, that it declares that, if one of the witnesses should be present at one stage and the other at another stage of the proceeding, the *talâk* would not be valid. When they testify to the acknowledgment by the wife of a repudiation, it is necessary that their testimony should be concordant, or relate to one and the same time, or "be given together." "Yet," says the *Sharâya*, "if *one* should testify to the *fact* of repudiation and the *other* to the *acknowledgment* of it, their testimony would not be admissible."[3]

[1] *Fatâwa Alamgiri*, Vol. I, p 533; *Fatâwa Kâzi Khân*, Vol. II, p. 29.

[2] *Radd-ul-Muhtâr*, Vol. II, p. 703.

[3] *Sharâya*, Vol. I, p. 316. Comp the *Jâmaa-ush-Shittât*.

When a *talâk* is pronounced in the presence of witnesses, it takes effect only when the appropriate words are employed. If a husband were to repudiate his wife first without witnesses, and then in their presence, the former proceeding would count for nothing. The obligations would spring from the date of the second *talâk* if valid.

Sunni doctrines.

The Sunnis, on the contrary, do not require the presence of witnesses. As long as the repudiation comes to the knowledge of the wife, it is considered sufficient and valid in law.

Shiah doctrines.

Under the Shiah Law, a *talâk*, pronounced in a paroxysm of anger, during which all self-control is lost, is invalid.

Sunni doctrines.

The Sunnis allow the use of an infinite number of formulæ—some obvious in their meaning, others conveying the intention only implicatively—for the purpose of effecting a *talâk*.[1] The Shiahs recognise only two as effectuating a valid repudiation. The use of any other formulæ, whether explicit or ambiguous, renders the proceeding void.

The author of the *Radd-ul-Muhtâr*, following Hamawî in his *Sharh-ul-Kanz*, lays down that in pronouncing the *talâk* the man must address it to some particular person, otherwise it will not be valid. And this view was enunciated by the Calcutta High Court in the case of *Furzund Hussain* v. *Jana Bibi*, in which it was held that the mere pronunciation of the word *talâk* three times, without its being addressed to any person, was not sufficient to constitute a valid divorce.[2]

Furzand Hussain v. *Jana Bibi.*

As the principle contained in this decision is inherent in the Shiah doctrines, which insist that a *talâk* in order to be effective should specify the particular person to whom it is addressed, the ruling would apply equally to Shiahs and Sunnis.

A dumb person may give *talâk* by signs; but if he is literate, a *talâk* pronounced by him must be in writing. The *Radd-ul-Muhtâr* says this is the Shâfeï doctrine, but most of our *ashâbs* (masters) have adopted it.[3]

When the word *talâk* or any of its customary synonyms is used

[1] For these formulæ see *Fatâwa Alamgiri*, Vol. I, pp. 520—33; *Fatâwa Kâzi Khân*, Vol. II, pp. 2—33; *Hedâya*, Vol. I, pp. 147—50.

[2] *Radd-ul-Muhtâr*, Vol. II, p. 685; I. L. 4 Calc., p. 588.

[3] *Ibid*, p. 697.

the separation would be effective, even should the man have no intention.[1]

Even if the words are mispronounced, for example, instead of pronouncing طلاق the man says طلاى or تلاى, it would be effective.[2]

And this idea of punishing the man for playing, as it were, with a double-edged instrument, is carried so far that it is laid down that if an ignorant man was taught the word *talâk*, and he were to pronounce it against his wife without knowing its meaning, the *talâk* would be effective "judicially," though not in the forum of conscience. But one lawyer, at least, takes a different view. Shaikh-ul-Ullâma Uzjandi has held that the *talâk* of such a person will not be effective, "that people may not be injured in their rights."[3] "This is stated in detail in the *Bazâzia*."

But where the words are mispronounced, and the husband were to say he pronounced the *talâk* with the object of frightening the woman, and that is really so, the *talâk* will not be effective.

And even if he were to pronounce the words rightly, but were to say that he used the words with the object of getting rid of his burden, the *talâk* will not take effect.[4] Nor will there be any *talâk* if he says, 'thy *talâk* is obligatory on me,' or 'I am compelled to *talâk* thee,' or 'God give thee *talâk*,' or 'I have bestowed on thee thy *talâk*,'[5] unless there is distinct intention.

Expressions by which a *talâk* may be effectuated.

So also if he were to spell out the word *talâk*. But if he were to take an oath that his wife (so-and-so) should become *talâked* from him if he did a particular act, it would take effect if he did commit the act in question.

A *talâk* will take place if the man says, "I am forbidden (*harâm*) to thee," or "thou art forbidden to me," or "I have released thee from being my wife," or "from thy marriage." But it will not be effective if he says, "I am free from thee," or "I am rid of thee."

If a woman were to say to her husband, "thou art not my husband," and he were to say, "yes, I am not," or "thou art not my wife," according to Abû Hanîfa, a *talâk* will ensue, if there was intention; but, according to the Disciples, it will not be effective at all.[6]

[1] *Radd-ul-Muhtâr*, Vol. II, p. 704.
[2] *Ibid*, p. 706.
[3] *Ibid*, p. 709.
[4] *Ibid*, p. 708.
[5] *Ibid*, p. 714.
[6] *Ibid*, p. 733.

Shiah doctrine. According to the Shiahs, there will be no *talâk* in any of the foregoing cases.

Waj Bibee v. *Azmat Ali.* In the case of *Waj Bibee* v. *Azmat Ali*,[1] the Calcutta High Court held that an instrument of divorce signed by the husband in the presence of, and given to, the wife's father, was valid, notwithstanding that it was not signed in the presence of the wife. How far this is in accordance with the Mahommedan Law must appear from what has been stated.

Badarunnissa Bibee v. *Mafiatulla.* In the case of *Badarunnissa Bibee* v. *Mafiatulla*,[2] it was held that, where a husband had entered into a private agreement with his wife, authorising her to divorce him upon his marrying a second wife during her life, and without her consent, the wife, on proof of her husband having married a second time without her consent, was entitled to a divorce. This case, however, though not consistent with the decision in *Mohabuth Ally* v. *Mymonissa*,[3] seems in accord with the Mahommedan Law.

Mohabuth Ally v. *Mymonissa.*

Hamid Ali v. *Imtiazan.* In the case of *Hamid Ali* v. *Imtiazan*,[4] a Sunni Mahommedan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his paternal uncle's daughter, meaning thereby that he would not regard her in any other relationship, and would not receive her back as his wife. The High Court of Allahabad held that the expression used by the husband to the wife being used with intention, constituted, under the Mahommedan Law, a divorce which became absolute if not revoked within the time allowed by that law; and that divorce having become absolute, the parties being Sunnis, the husband was not entitled to the custody of his infant daughter until she had attained the age of puberty.

But the learned Judges seem to have overlooked that a paternal uncle's daughter is not within the prohibited degrees.

Ashraf Ali v. *Assad Ali.* In *Ashraf Ali* v. *Assad Ali*,[5] the Calcutta High Court held that where the husband gives the wife an option as to declaring herself repudiated, and she avails herself of it, the repudiation or divorce is binding on him: and a discretion to repudiate when attached to a condition need not be limited to any particular period, but may be absolute as regards time. Such option is not lost by non-user where

[1] 8 W. R., 23.
[2] 7 B. L. R., p. 442; 15 W. R., p. 555.
[3] Marshall, p. 361.
[4] I. L., 2 All., 71.
[5] 16 W. R., 260.

there is nothing in the contract between the parties obliging the wife to exercise the option directly a breach of the condition occurs.

Under the Hanafî Law, the husband has the right to authorise any person to pronounce the *talâk*. He may even give his wife the power to divorce herself from him according to the form prescribed by that law for divorce by the husband.[1]

A *talâk pronounced* in the absence of the woman is valid, but until it comes to her knowledge she is entitled to her maintenance.[2]

In the case of *Sherif Saib* v. *Usanabibi Ammal*,[3] the husband was sued by his wife for maintenance. The defendant pleaded that he had divorced the plaintiff on the 8th January 1862. Both the lower Courts found that no divorce had taken place upon the following facts: Defendant went to Trichinopoly, leaving his wife at Tinnevelly. While at Trichinopoly he received letters from Tinnevelly, informing him that his wife was leading an immoral life. He, thereupon, went before the Town Kâzi of Trichinopoly, made a written declaration in the shape of a letter to plaintiff to the effect that he had divorced her, and repeated the divorce three times successively before the Town Kâzi of Trichinopoly. Defendant directed also that the letter of divorce should be sent to the plaintiff, but there was no evidence of her having received it. *Sherif Saib* v. *Usanabibi Ammal.*

The Madras High Court, on special appeal, held that a valid divorce had taken place, and that the compressing the expression of the intention into one sentence did not seem, on the authorities, to affect the legality of the repudiation, although some doctors consider the process immoral. But the learned Judges gave the go-by to the right of the woman to receive maintenance until the *talâk* came to her knowledge, as also to the rule in the *Fatâwa Alamgiri*, already referred to.

In another case in the same Court,[4] a Mahommedan woman claimed a divorce from her husband on grounds which she failed to establish at the trial; but the husband, at the suggestion of the Court, agreed to give her a *khulâ* on terms to be settled by a Kâzi. The High Court held that the action of the Court in not dismissing the suit, but proceeding to suggest a compromise by means of a

[1] *Hamidoola* v. *Faizunnissa*, I. L., 8 Calc., p. 327; 10 C. L. R., p. 291.

[2] *Zakhîrat-ul-Maâd*, p. 747.

[3] 6 Mad. H. Ct. R., p. 452.

[4] *Vadake Vitil Ismal* v. *Odakel Beyakutti Umah*, I. L., 3 Mad., p. 347.

khulâ divorce, was not illegal, and that a *khulâ* divorce is valid though granted under compulsion.

Jaun Bibee v. *Beparee.*

In *Jaun Bibee* v. *Beparee*,[1] the Calcutta High Court held that a charge of adultery by a Mahommedan against his wife does not operate as a divorce, though if false it might be an item of ill-usage towards making up a sufficient answer to his claim for restitution of conjugal rights, and that ill-treatment by him and his second wife would justify the first wife in leaving him.

Bukhsh Ally v. *Ameerun Bibee.*

In the case of *Bukhsh Ally* v. *Ameerun Bibee*,[2] the Calcutta High Court was unable to express any opinion on the question whether the husband's statement that he had divorced his wife was sufficient proof of the fact. Had the learned Judges, who decided the case in question, been aware of the *dicta* contained in the *Radd-ul-Muhtâr*, they would not have any had doubt that a mere statement of the husband is not sufficient.

According to the Hanafîs, *talâk* may be given to take effect at a future time even without the mention of any condition. It may also be suspended on or attached to a condition and made contingent on its occurrence. In the former case, repudiation takes effect immediately on the arrival of the time to which it may have been referred; in the latter, it takes effect on the occurrence of the event on which it has been made to depend. And revocable, as well as irrevocable, repudiations are susceptible of being referred to a time or made subject to a condition.

Legal effects of a Talâk.

In the consideration of the question of *talâk*, it is necessary to bear in mind the difference as to the legal effects which arise from the form in which the formulæ are pronounced. It has been already stated, that a *talâk*, in view of the legal consequences arising from it, is either *bâin*, (complete or irreversible,) or *rajai*, (incomplete or reversible). *A talâk-ul-bâin* involves a definitive dissolution of marriage, without reservation of the power of retractation. In the *talâk-ur-rajai*, the husband has the option of resuming connubial intercourse. A *talâk-ul-bâin* takes effect immediately after the formulæ are pronounced, under the following circumstances:—(1) when there has been no cohabitation; (2) when

[1] *Jaun Bebee* v. *Beparee*, 3 W. R., p. 93. For the custom as to divorce among the Khojas, see *in re Kasam Pirbhai*, 8 Bom. Cr., p. 95.

[2] 2 W. R., p. 208.

connubial intercourse is impossible by reason of tenderness of age on the part of the wife, or from old age ; (3) when the parties have dissolved the tie by mutual agreement.

The retractation or recantation in the case of *talâk-ur-rajai* is called *rajaat*. Retractation.

If the *rajaat* is effected by words, the testimony of witnesses is admissible in evidence ; if by act, the wife is to be believed on her affirmation. Every *talâk-ur-rajai* becomes a *talâk-ul-bâin*, after the expiration of a certain period, *viz.*, three months, during which the parties evince no intention of resuming cohabitation.

In both kinds of *talâk*, both among the Sunnis and the Shiahs, it is necessary that at the time of the repudiation there should exist a valid marriage between the parties. With the Shiahs, it is further necessary that it should be a permanent contract of marriage (*nikâh-ud-dâim*). According to those Shiahs who recognise the validity of temporary contracts, there is no *talâk* in such marriages.[1]

Generally, the initiative of the *talâk* is left to the husband, but, as will be shown hereafter, the Hâkim-ush-sharaa can force him, in a variety of cases, and for many specific causes, to dissolve the marriage-tie.

In a *talâk-ur-rajai*, the Hâkim-ush-sharaa has a right to interfere if the husband acts against the spirit of the law.

In every case, where the *talâk* is pronounced on the initiation of the husband, he has to render the wife an account of the administration of her estate during their marriage, and to make over to her all her property together with the ante-nuptial settlement or *mahr*. On failing to do so, he is liable to a suit for damages as well as for payment of the dower.

After the expiration of the period of probation in the case of a *talâk-ur-rajai* as well as a *talâk-ul-bâin*, the woman has the right to contract a fresh marriage.

Section IV.

Talâk-ul-Marîz (Repudiation by the Sick).

In many cases it might happen that the husband, lying *in extremis*,[2] or suffering from a disease which eventually caused his death, wants to exercise the power of *talâk*, with a view of

[1] See *ante*, p. 351.

[2] A person *in extremis* divorcing his wife is technically called a *fârr* ; see the *Radd-ul-Muhtâr*, Vol. II, p. 855.

preventing his wife from succeeding to his estate. In order to obviate the mischief which might result from this unjust exercise of the power of *talâk*, certain rules are laid down for such cases, which require careful attention, as they mark a broad distinction between the Shiah and the Sunni schools.

"It is abominable and sinful," says the *Sharâya*, "for a sick man (*marîz*) to repudiate his wife, yet if he should do so it is valid." The Sunni *Hedâya* is more concise. "A sick man may divorce his wife, though he be on his death-bed."

Among the Sunnis, when a man *in extremis* pronounces a *talâk* and dies before the expiry of his wife's *iddat*, she is entitled to take her share in his estate. But if he were to die *after* the expiration of the probationary term her right of inheritance is lost.[1]

Shiah doctrines.

According to the Shiah doctrines, she has a right to inherit from him if he should die any time within a year from the date of the *talâk*, whether it was *reversible* or definitive (*rajai* or *bâin*), provided that in the meantime the woman did not marry any other person. If during this period, when the law, by its own operation, preserves her right of inheritance, she contracted a second marriage, the right of succession to her first husband would be lost. Similarly, the woman would have no right to take a share in the estate of the repudiator if he should recover from the illness from which he was suffering when he pronounced the divorce, fall sick again and *then* die, unless the recovery, the relapse, and death all occur within the term of the woman's *iddat*.

Hanafi Law.

The rule of the Sunni Law, as mentioned before, is different. Should a man who has pronounced a *talâk-ul-bâin* against his wife on his sick-bed, recover, but afterwards have a relapse and die within the term of the wife's probation, she would not inherit from him. If, however, the *talâk* was only *rajai* and not definitive, she would retain her right of succession.[2]

Shiah doctrine.

Under the Shiah Law, if a person *in extremis* were to divorce his wife under a *reversible* or *rajai talâk*, and she were to predecease him, *before* the expiration of her own *iddat*, he would inherit from her; but if the *talâk* were *bâin*, or if he were to die *after* the probationary term, his heirs would have no right of inheritance on the ground of his right.[2]

[1] *Radd-ul-Muhtâr*, Vol. II, p. 855.

[2] *Fatâwa Alamgiri*, Vol. I, pp. 638—63; *Nihâya*.

Reference having already been made to the invalidity of a *talâk* pronounced by a minor or by his guardian on his behalf, attention must be directed to the effect on a minor woman of a *talâk* pronounced against her by her legally qualified husband. Both schools insist that the formula or *sighèh*, by which the *talâk* is pronounced, should in every case be understood by the wife. It would seem to follow, therefore, that when she is of such tender age as to be unable to comprehend the legal consequences flowing from the act of repudiation, or does not possess discretion (*rushd*), a valid *talâk* cannot be effected against her. The Shiah *Nail-ul-Marâm* requires *akl* (sound understanding) on both sides for the effectuation of a proper repudiation.

Hanafi doctrine. *Talâk* pronounced against a minor wife.

The *Radd-ul-Muhtâr* states, however, that when a girl-wife is under the age of puberty, a *rajâi talâk* pronounced against her would become *bâin* on the expiration of three months and not the usual three terms of purity.

Can the husband exercise the power of *talâk* when the wife is an imbecile or insane? This question again is not free from difficulty. Mere imbecility does not give the husband the right of cancelling a marriage, and in the case of insanity it is necessary that it should have existed prior to the marriage, in order to furnish a proper ground for the cancellation of the marital tie. The question suggested does not, however, refer to the right of cancellation, but to the faculty of *talâk*. Under certain circumstances and subject to certain well-defined conditions, the power of dissolving the marriage relationship is vested in the husband, on his paying the dower settled on his wife. Can a husband, then, who cannot have the marriage cancelled on the ground of his wife's insanity, dissolve the connection by another process—*viz.* the *talâk*? As a wife's knowledge of the proceeding is necessary in every case of *talâk*, and as the law provides a means of release from a person permanently insane, *viz.*, by a proceeding before the Kâzi, it would appear by parity of reasoning, that a *talâk* pronounced against a woman who is insane—unless during a lucid interval—would be invalid.

Several cases have occurred in India in which a husband and wife, after being definitively divorced from each other, have resumed cohabitation without submitting themselves to the orthodox requirements, but these do not appear to have been brought before a Court of Justice.

If the validity of this cohabitation were judged by the Sunni Law, it would be difficult to pronounce it lawful. If, after the resumption of intercourse, the parties, in order to escape the bann which the Sunni Law imposes on the connection, were to declare that they followed the Shiah doctrines, and the husband were to state that at the time of pronouncing the *talâk* he had no *intention* of dissolving the matrimonial-tie definitively, then the cohabitation would be legal.

Delegation of the power of *talâk*.

Both schools allow the husband to delegate his power of repudiation to a third person, or to the wife herself. The delegation of option called *tafwîz* by the husband to his wife, confers on her the power of divorcing herself, but this right is restricted to the precise place or situation in which she receives the power, and falls to the ground on her removal from there, as that circumstance proves her rejection of it. Intention on the part of the husband is requisite to constitute a delegation. If the delegation be accepted by the wife and the right exercised, it would take effect as an irreversible divorce under the Hanafî Law.[1]

Tafwîz is of three kinds, (1) *ikhtiâr*, giving her the authority to *talâk* herself, (2) *amr-ba-yèd*, leaving the matter in her own hand, and (3) *mashiat*, giving her the option to do what she likes. All these when analysed resolve themselves into one, *viz.*, leaving it in her or somebody else's option to do what she or he likes.

Ikhtiâr.

Hanafî doctrines.

Examples of *ikhtiâr* are given at some length in the *Fatâwa Alamgiri*, but it seems to me unnecessary to dwell on them here, as they are more or less unknown in this country ; but the delegation must be exercised at the meeting or place where the power is given. If the man, however, before she has exercised it, "takes her by the hand and raises her up standing," or embraces her or shows by any indication that he has recanted, the option is at an end.

The delegation must refer distinctly to the person to whom the power is entrusted ; and therefore it is stated to be necessary that when the word 'choose' is used either the word 'self' or the word 'repudiation' should be used by one or the other party. For example, if the man said, 'choose thyself' or 'choose a repudiation,' and the woman answered, 'I choose,' it would amount to a *talâk*.

[1] *Fatâwa Alamgiri*, Vol. I, p. 543 ; *Kanz-ud-Dakâik*.

Or, if he said, 'choose,' and she answered, 'I have chosen myself' or 'I have chosen a *talâk*,' it would be sufficient. But if he were merely to say, 'choose,' and she replied, 'I have chosen,' there is no *talâk*.

In *Amr-ba-yèd*, also, it is necessary to use the word 'self' or some analogous expression. As in the case of express delegation (*ikhtiâr*), the husband has no power to recall the authority once entrusted. The only difference between the two is that, in *ikhtiâr* the intention to give an irrevocable *talâk* at once is not valid, whereas in *Amr-ba-yèd* it is. When a man tells his wife 'thy business is in thy hand,' his intention being to give her the power of *talâking* herself, and she is present and has heard what he said, the power is in her hands whilst she continues at the place. If she were absent, and the option was given in general terms, she may exercise it at any time whilst at the place (*majlis*, *lit.* place where she was seated) where the intelligence reached her. But if it were restricted to a particular time, and the intelligence reaches before the expiration of the period, she has only the remainder of the time for the exercise of the power; whilst if the time has expired, there is no option. When a husband does not intend to *talâk* by these words, 'thy business is in thy hand,' they are of no avail, except when uttered in anger or in a conversation regarding *talâk*. *Amr-ba-yèd.*

The wife cannot sue to enforce the authority alleged to have been given to her, but she may sue, after she has given effect to it, to make the husband liable for her dower or to restrain him for seeking conjugal relationship.

When the exercise of the option of *talâk*, whether entrusted to the wife or a third party, is made conditional, it *may* be either indefinite as to time or may be limited to a fixed period. For example, if a man were to say to his wife, 'if such a thing happens, your business is in your hand'; on the happening of that contingency, the woman would have the power of *talâking* herself whilst seated at the place where she heard of the event or where it happened. Or, the man may say, 'if such an event happens, your business will be in your hands for a month'; she will have the power for a month after the event has happened.

The option mentioned may be made conditional on his taking a second wife, or on his going from his place of residence without her permission, or on striking her without any legal cause.

But in all these cases, the condition must be fulfilled, literally and fully, before the power can be exercised. For example, if a man were to say to his wife, 'thy business will be in thy hands, if I go out of Bokhara,' and he only goes to its suburbs, there is no option. In all cases of disputes, the husband's word (*kawl*) is to be preferred.

Mashiat is similar to the above forms of delegation; only it leaves the exercise of the power absolutely to the 'pleasure' or will' of the party to whom the power is delegated.

The authority to *talâk* must be expressly delegated to a third party before he can *talâk* the wife of another. A mere *mukhtâr âm* or general agent has no power.

Shiah doctrine. According to the Shiahs, an option given to the wife has no effect, nor is a conditional *talâk* valid. Any condition or description attached to a *talàk* would invalidate the procedure.

Marriage being considered a holy institution, though it may be contracted, according to the Shiahs, without any witness, it cannot be dissolved unless in the presence of two male witnesses of known "probity," who hear the actual words.

Section V.

Miscellaneous Principles.

Revocation or *rajaat* is defined in the *Fatâwa Alamgiri* to mean the expression of an intention on the part of the husband to continue the status of marriage whilst the wife is still in her *iddat*.

When a man has *talâked* his wife by one or two revocable *talâks*, he may retain her whilst she is still in her probation.

Rajaat is of two kinds: *Sunni*, in accordance with the *sunnat*, or traditions, or *Badaï*, or irregular. When a man intimates his intention of revocation to the wife and calls on witnesses to attest the fact, it is said to be a *rajaat* in accordance with the *sunnat*. If he fails to give her any intimation of his intention, the *rajaat* is said to be *badaï*. But it is valid all the same. Any act tending to show that he has changed his mind would be tantamount to revocation; but the man is recommended to ask some person to attest the *rajaat*.

Rajaat is valid whether made in jest or under compulsion, but is ineffective, if it is made subject to a condition.

When the parties are agreed as to the expiration of the *iddat*, but differ as to the fact of *rajaat*, the word of the wife is said to be preferred. If, however, the *iddat* be still unexpired, preference is given to the word of the husband. If he should adduce proof after the *iddat* that he had said, during her *iddat*, 'I have retained her,' or 'have resumed cohabitation,' it would amount to a *rajaat*. Even his statement, 'I retained her during her probation,' if assented to by the wife, would be a *rajaat*.

The right of *rajaat* ceases as soon as the three terms of a free woman are over. In the case of a slave-wife it is two terms.

"When a man has *talâked* his wife irrevocably without giving her three *talâks*," in other words, when he has given her a *talâk-ul-bâin* in the *badaï* form and not according to the traditions, he is permitted to re-marry her during her *iddat* or after its expiration. But when she has been *talâked* by three *talâks* given at the interval of each month or each term of purity during which no cohabitation had taken place, he is not allowed to re-marry her until she has been married to another man by a valid and operative contract, with whom she has cohabited and been either divorced from him or become his widow by his death.[1]

The first husband who has *talâked* his wife is permitted to enter into a fresh contract of marriage with her, upon her mere statement that after her *talâk* by him she had been married to another man with whom she had cohabited, and from whom she had separated since by *talâk* or death, and had completed her probation, provided he (the first husband) believes her statement.

But if the first marriage was invalid, the *talâk* being unnecessary, the first husband is allowed to re-marry her without any second marriage.

In order to secure a separation from the *legaliser* the woman is recommended to marry him only on the condition of "having the business in her own hand" and to *talâk* herself whenever she pleases.

Every woman married to a man by a lawful contract is bound, for the prevention of confusion of parentage, to observe a probation in case of the dissolution of the marriage tie. But if the marriage

[1] This second husband is called a legaliser. A *murâhik*, an adolescent boy, is competent among the Hanafis to be a *legaliser*, but not among the Shiahs.

is invalid and the parties have separated before *actual* consummation, there is no *iddat*. But if consummation has taken place, the *iddat* will be reckoned from the time of separation (*tafrîk*).

There is no *iddat* for fornication.

The *iddat* of a free woman is three full terms, but of one who is too young or too old three months, counted by days; in other words, ninety days.

The period of probation when the husband dies after the *talâk*. Hanafi doctrines.

In the case of a revocable *talâk*, if the husband were to die after the divorce, the woman's *iddat* would run from his death, whether the *talâk* was given in health or in sickness. But if a *talâk-ul-bâin* was given in health, and the woman does not inherit from him by reason thereof, the *iddat* is not to be reckoned from death. If he was ill at the time and the woman does inherit from him by reason thereof, *viz.*, owing to his having been ill and subsequently dying before the expiration of the *iddat*, the period of probation is four months and ten days, during which there must be three of the usual terms; so that if these should not be completed during the period, the *iddat* is to be carried on till their completion. When a young girl under puberty is *talâked*, and three months less one day have passed when she attains puberty, in such a case her *iddat* will not be completed until the usual three terms have been completed. A man *talâks* his wife revocably, she keeps the *iddat* for three terms but one day, when the husband dies: four months and ten days are now incumbent on her.

When a divorced woman has kept her *iddat* for one or two terms and they then cease, the *iddat* is not completed until she despair of their return, whereupon she must commence anew by months.

The *iddat* of *talâk* commences from the *talâk* and that of death from the death; so that if the events are not known until the period of the *iddat* has actually passed, it is held to have expired. "And 'our' Shaikhs have decreed with respect to *talâk* that it (*iddat*) shall commence from the time of the acknowledgment (*ikrâr*) to avoid the suspicion of collusion."

Shiah doctrines.

According to the Shiahs, *iddat* is imcumbent upon a woman, who is *talâked* or separated, only when there has been actual cohabitation, for *khilwat-us-sahih* is not recognised among them. But a widow is bound to observe the probation in all cases whether there has been cohabitation or not.

In the case of a pregnant woman *iddat* lasts until delivery.

If after the expiration of her *iddat* the woman re-marries, and then it is suspected that she was pregnant, the *iddat* is not invalidated. But if it turns out that she was actually pregnant from her husband, the second marriage is inoperative.

If a man were to *talâk* his wife revocably and she is pregnant at the time, and the husband were to die during her *iddat*, she must observe the *iddat* of death from delivery. But if the *talâk* was *bâin* she must only complete the *iddat* of pregnancy.

When a married woman has become pregnant by adultery, and is then *talâked* by her husband, her *iddat* would be three months, and not delivery.

The *iddat* of death is the same as among the Hanafis, *viz.*, four months and ten days.

General doctrines.

When a woman's husband is away from home and she is informed by a trustworthy person that he has died, and that the informant was present at his funeral, in such a case, it is lawful for her to observe the *iddat* and contract another marriage, even though some others may tell her that her (first) husband was alive, unless they mention a date subsequent to the time mentioned by the first informant as the date of his funeral. Similarly, if a man were to inform a woman whose husband was away that he was dead, whereupon she and the people of the house performed the usual ceremonies, and she, having kept her *iddat*, intermarried with another person and cohabited with him, after which there came another man who informed her that her first husband was still alive, saying, "I have seen him in such a city," the author of the *Bahr-ur-Râik* states that, in these circumstances, if the woman believed the first informant, the marriage between her and the second husband would not be nullified and they may both lawfully abide by it.

CHAPTER XIII.

DISSOLUTION OF THE MARRIAGE TIE PROCEEDING FROM THE WIFE (*KHULA*).—*MUBARAT*.

PREVIOUS to the Islâmic legislation, the wives had no right to claim a dissolution of the marriage on any ground whatsoever. In special cases only the power of divorce was expressly reserved in their favour by contract. As a general rule, neither the Hebrews nor the pre-Islâmic Arabs recognised the right of divorce for women. The Koran allowed them this privilege which had been denied to them by the primitive institutions of their country.

"When married parties disagree," says the *Fatâwa Alamgiri*, following the *Iledâya* and the *Badâya*,[1] "and are apprehensive that they cannot observe the bounds prescribed by the divine laws, (that is, cannot perform the duties imposed on them by the conjugal relationship,) the woman can release herself from the tie by giving up some property in return, in consideration of which the husband is to give her a *khulâ*,[2] and when they have done this a *tâlâk-ul-bâin* would take place."[3]

The mode of procedure pointed out in the above passage is founded on the principle laid down in the Koran;[4] and whilst it has assumed only one form under the Sunni Law, under the Shiah it has taken two.

Sunni and Shiah doctrines.

When the wife, owing to her aversion to the husband, or her unwillingness to fulfil the conjugal duties, is desirous of obtaining a divorce, she may obtain a release from the marital contract by

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[1] *Fatâwa Alamgiri*, Vol. I, p. 668; *Fatâwa Kâzi Khân*, Vol. II, p. 134; *Kanz-ud-Dakâik*; *Sharâya*; *Mafâtîh*; *Jâmaa-ush-Shittât*; *Irshâd-ul-Allâmah*; D'Ohsson; Sice; Sautayra.

[2] *Lit.* extinguishment; *Radd-ul Muhtâr*, Vol. II, p. 916.

[3] *Fatâwa Alamgiri*, Vol. I, p. 669.

[4] Chap. ii., v. 229; chap. iv., v. 127.

giving up either her settled dower, or some other property; such a divorce is consequently called *khulâ*. When a divorce is effected by mutual consent on account of mutual aversion, it is called *mubârât*, which operates as a release and discharge on both sides.

The Sunnis place *mubârât* under the head of *khulâ*, but the Shiahs regard it as a distinct proceeding. The essential difference between *talâk*, *khulâ*, and *mubârât*, has been already pointed out,[1] but it may be mentioned here that *khulâ* and *mubârât* take effect as an irreversible divorce.

Capacity for *khulâ*. Shiah doctrines.

Under the Shiah Law, the four conditions necessary for the effectuation of a valid *talâk* are also requisite for the performance of *khulâ*. The husband must be *bâligh* (adult), sane (*aâkil*), must be *mukhtâr* (master of his own actions, or free agent), and should have the intention (*kasd*). "To effect a valid *khulâ*," says the *Sharâya*, "the man must be adult in age, sane, free in choice, and it must be granted intentionally. No *khulâ* is valid if granted by a boy under puberty, with or without the permission of his guardian, or by one acting under compulsion, undue influence, or fraudulent representations." A *khulâ* is invalid when the grantor is in a state of intoxication, or deprived of self-control through a paroxysm of rage. The guardian of a *non compos mentis* may, however, enter into an agreement with the wife to dissolve the marriage contract on her abandoning the dower. With reference to the woman herself, the same conditions are necessary as in the case of a *talâk*.

In *khulâ* also, the Shiahs insist on the observance of particular forms. The formulæ are required to be express in their significance and unconditional in their character. The words must be pronounced in the Arabic language (when there is ability to pronounce that language). If any *condition* be attached to the proceeding, it falls to the ground. After the expiration of the probationary term, a *khulâ* takes effect as a definitive divorce. A *khulâ*, like a *talâk*, requires, under the Shiah Law, the presence of two witnesses of irreproachable character.

If a husband were to grant a *khulâ* to his wife, *while their dispositions and tempers are still in harmony*, it would not be valid. "If the husband transgress his marriage duties," says the *Nail-ul-*

[1] See *ante*, p. 334.

Marâm, "the woman has the right of forcing him to accomplish those duties, or she can claim the intervention of the Judge." In case of habitual discord between husband and wife, an impartial woman, called *hâkima*, is selected by the Hâkim-ush-sharaa to try and effect a reconciliation between them.

In trans-Caucasia, where the indigenous institutions which are the offspring of the Mahommedan Law still exist, the Kâzi has the right to proceed himself to effect the reconciliation.

Shâfeï and Hanafî doctrines.

Among the Shâfeïs and Hanafîs, in countries where the Islâmic law is in force, the Kâzi, in case of a disagreement between husband and wife, appoints two females, one on the woman's behalf, the other on the husband's, to arbitrate between them, and to endeavour to bring about a reconciliaition. If the causes of dissension continue, or if the attempts to reconcile the parties prove unavailing, then they are allowed to dissolve their marriage by any of the procedures indicated above.

According to the Mutazala view, all cases of this kind must be submitted to the Judge for a decision.

Under the Shiah Law, the same formalities are required for *mubârât* as for *khulâ*. A *khulâ* obtained by the guardian of a woman or by her father is valid as a reversible divorce, but she is not bound to deliver the dower to her husband, unless she herself has authorised the persons who obtained the divorce to act for her. If she authorised them to act on her behalf, their powers would be limited within the scope of their authority ; but if they acted without authority and the husband granted the *khulâ*, neither they nor the wife would be bound to pay him back the dower. If the wife be a minor, and her guardian enter into an arrangement with her husband and obtain for her a *khulâ*, it would not be valid.

Hanafî doctrine.

The compensation which the wife, in a proceeding of *khulâ*, makes to the husband is a means to an end, *viz.*, the dissolution of the marriage tie by obtaining his consent. This is not, however, an essential condition, for divorce is validly made when the consent of the parties to dissolve the relationship is given.

"Although the compensation agreed upon may not have been paid," says the *Iledâya*, "a *mubârât* (signified by a man saying to his wife, 'I am discharged from the marriage between you and me,' and her consenting to it) is the same as a *khulâ* ; that is to say, in consequence of the declaration of both, every claim which each

had upon the other, drops, so far as those claims are connected with marriage." [1]

In accordance with the principle mentioned above, the Algerian Courts have decided that, when the married parties have become divorced from each other by mutual consent, the proceeding effects a complete separation, even though the wife should fail to pay the compensation agreed upon, or to abandon the settled dower, and even though the husband should contend that on that account the *khulâ* was not valid.

It will be observed, therefore, that mutual consent alone suffices under the Sunni Law to effect a *khulâ*, though in one passage the *Hedâya* goes so far as to say that *intention* is not necessary or "essential to it, the mere mention of a compensation being sufficient in law."

Shâfeï and Mâlikî doctrines.

As a general rule, all women who can contract a valid marriage can initiate the proceeding of *khulâ* or *mubârât*. This rule is, however, subject to several exceptions. According to the Mâlikîs and the Shâfeïs, the adult female has a personal right ; she alone can institute the proceeding and consent to give the *compensation* required, though she cannot always consent to her marriage or contract a valid marriage without the consent of her guardian or *walî*. The father can enter into an arrangement of *khulâ* on behalf of his daughter who is a *sarîra* (a minor) and on whom he has imposed the status of marriage. As she is subject to the *patria potestas*, the father can consent to a *khulâ* on her behalf and abandon a portion of her dower to obtain a dissolution of the contract. In the same way, the father of a boy, who is a *sarîr*, (a minor,) can consent to the *khulâ* on behalf of his son. The *wasî*, or the father's executor, can consent only when the powers of the father of the family are vested in him. The *sarîra* herself cannot legally enter into *khulâ*, although the arrangement into which she enters is not necessarily, as far as the actual separation is concerned, invalid. Al-Karkhî is of opinion that when a minor wife has agreed to a separation, on condition of abandoning her dower or of paying a compensation, the separation is valid, but the stipulation as to the dower or compensation is null and void ; and if she have made any payment it must be restituted.

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[1] *Hedâya*, Vol. I, p. 323 ; *Fatâwa Alamgiri*, Vol. I, p 669 ; *Kanz-ud-Dakâik*.

The woman who is devoid of intellect can, according to some of the Mâlikî doctors, enter into a *khulâ*, but Sîdî Khalîl has thrown considerable doubt on this view.

Hanafî rules.

The Hanafîs accord to all adult females the exclusive right of entering into a *khulâ*. They make no distinction between a woman who has intellect and one who has not. As regards the *sarîra*, they authorise the father or his executor to enter into a *khulâ* on her behalf. "If a father," says the "*Hedâya*," enter into a *khulâ* on behalf of his minor daughter for a certain compensation, engaging to hold himself personally responsible for its due payment, such *khulâ* is valid; . . . but if the father were to stipulate that it would be paid by her, then she has the faculty, when she arrives at majority, to accept or refuse the arrangement. According to the *Hadîs* of the Prophet, a *khulâ* is dependent on the ratification of the woman."[1]

Among the Hanafîs, the husband, if he be adult, may himself or by his *wakîl* (authorised agent) consent to the *khulâ*, and by his guardian, if he be a minor.

The husband, who is suffering from an illness which in the language of the law is called *death-illness* or *marz-ul-maut*, which eventually causes his death, has the faculty of giving a valid consent; but, as in the case of a *talâk* pronounced *in extremis*, so also in that of a *khulâ* given under similar circumstances, the wife would not be divested absolutely of her heritable rights.

A woman can, whilst suffering from a fatal illness, enter into a *khulâ;* but, as in such cases there is a possibility of undue influence being exercised over her, the law declares that when a woman dies from an illness during which she has entered into a *khulâ*, any gift made by her in consideration of the *khulâ* shall be restored to her heirs.[2]

It is difficult to define with exactness the term *marz-ul-maut*.

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[1] *Hedâya*, Vol I, Bk. iv, chap. 8. If the wife has been compelled by the ill-treatment of the husband to seek for a divorce, it is unlawful for him to take an indemnity. And if the man has forced the woman to accept the *khulâ*, a *talâk* will take place without any liability to pay the indemnity; see the *Radd-ul-Muhtâr*, Vol. II, p. 928. If a *khulâ* is given and accepted, but the compensation is not mentioned, the deferred dower, or any portion thereof remaining due, will be taken as such.

[2] Some authors hold that the husband is bound to restore such sum, less the amount of his own share in the estate of the wife.

Some lawyers consider it as an illness which causes death within a year ; others think it to mean an illness which incapacitates an individual from performing the ordinary avocations of life or from standing up for prayers. Neither of these definitions, however, seems entirely to cover the sense which is apparently intended to be conveyed by the words, though the Shiah jurists evidently adopted the first meaning. In some cases, the disease does not terminate fatally within a year, but the mind is paralysed and the sufferer is unable to exercise his mental faculties. In other cases, the illness does not affect the mind, and the individual is able, more or less, to pursue his ordinary avocations. The view adopted by the *Fatâwa Alamgiri* and the *Jâmaa-ush-Shittât* seems to be most consistent with correct reasoning, *viz.*, that any illness which, in the ordinary course of nature, causes death, or leads to a fatal result within the space of a year, is *marz-ul-maut*.[1]

The consent to a *khulâ*, according to the Sunni doctrines, may be pure and simple, or conditional. When it is simple and unconditional, it produces the effect of a complete and definitive separation like a *talâk-ul-bâin*. When the consent is conditional, the separation does not take place until the condition is fulfilled.[2] According to the Shiah Law, a *khulâ*, in order to be valid, must be absolutely unconditional.

According to the *Hedâya*, as well as the *Badâya*, consent given by the husband to a separation on condition of the wife abandoning the dower, or paying him a certain sum, or making over to him any property, does not entitle him to cancel the *khulâ* on her failing to fulfil the contract ; but he may either sue her for the amount she agreed to pay him, or set-off the same against any claim she may advance against him.[3]

When a wife sues her husband for her dower, alleging that he has given her a *talâk*, and the husband in defence pleads that the wife entered into a *khulâ*, thereby abandoning her dower, the dispute would resolve itself into a mere question of evidence, whether or not it was at her instance the separation took place,

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[1] See Vol. I, pp. 53-56.

[2] *Fatâwa Kâzi Khân*, p. 124 ; *Kanz-ud-Dakâik*. In a *khulâ* the husband has no option ; the wife has. For example, if a *khulâ* is offered to the wife she may take time to consider the matter; see the *Radd-ul-Muhtâr*, Vol. II, p. 919.

[3] *Hedâya*, Vol. I, p. 320.

and whether or not she abandoned the dower in order to obtain a release from the marriage tie. If there be no reliable evidence, the *Fatâwa Kâzi Khân* and the *Fatâwa Alamgiri* say, "the word is hers, as to the dower, and his as to the maintenance," that is, she would be believed as far as her allegation is concerned that she did not abandon the dower, but the husband would not be bound to provide her maintenance during the *iddat*.

Bulzur Raheem v. *Lutfunnisa.*

In the case of *Bulzur Raheem* v. *Lutfunnisa*,[1] the Sudder Court held that the allegation of a *khulâ* on the part of the husband set up as a defence to the suit of the wife for dower on the ground of *talâk*, is tantamount toa *talâk*, if hefails to prove his allegation.

"When a husband asserts," says the *Mabsût*, "that he has entered into a *union* with his wife," that is, after agreeing to a discharge, "and the wife denies the same, the statement of the wife is to be credited, and a divorce takes place in consequence of the husband admitting a divorce."[2]

Shiah doctrines.

According to the Shiah Law, a *khulâ* requires to be pronounced in sacramental terms, the *sighèh* being as necessary in *khulâ* as in *talâk*. Among the Sunnis, no particular form of *sighèh* is needed, as long as the consent is formally expressed. They recognise one

Hanafi rules.

essential difference between *khulâ* and *talâk*, which it is important to bear in mind. In *talâk*, the repudiation may be conveyed by the husband in any terms, implicatively or expressly; in *khulâ*, though *kinâyèt* is allowed, the consent is required to be given in more definite language. For example, it is not sufficient for the husband to declare that he would not coerce his wife to remain with him if she would indemnify him; that *he* wished for the separation; that he would arrange with her relatives the matter of the separation, &c., because none of these expressions necessarily imply the intention of the parties to dissolve the contract. If the husband were to say that he was willing to dissolve the union if the wife wished it, or that he would do so at once if she gave up her dower and agreed to the terms, the *khulâ* would be valid, as in these cases the intention of the parties is sufficiently manifested. In the same way, if the woman were to say: "Give me a *khulâ* in exchange for my dower," and the man were to reply, "I do," a lawful dissolution of the marriage tie would be effected and the dower would drop.

[1] Sevestre's Reports, p. 251.

[2] *Fusûl Imâdia* (Cal. Ed.), p. 481.

Among all the schools, which recognise the faculty of the parties to a marriage contract to dissolve it without the intervention of the Judge, the stipulation of an indemnity is a necessary condition to the validity of a *khulâ*. If the woman give in compensation something over which she has no right, the *khulâ*, under the Sunni Law, is not obligatory on the husband.[1]

Under the Shiah Law, the *khulâ* would be valid, and the husband would be entitled to recover from his wife the value of the specific article which she had stipulated for.[2]

As a general rule everything which may be given in dower may serve as a compensation for *khulâ*. "Whatever is lawful for dower, or is capable of being accepted as dower, may lawfully be given in exchange for *khulâ*."[3] The (Shiah) *Sharâya* uses similar words. It says: "Whatever may be given for dower may validly be given as indemnity for *khulâ*, and there is no limit to the same either in amount or quantity."[4]

The *Mafâtîh*, however, adds the following significant words to the dictum of the *Sharâya*:—"Anything that can validly be a dower, can validly be a compensation, whether it be a thing in existence or not—as suckling the child of the union, the mother's right of *hizânat*, her or her child's maintenance, &c."

The Sunni jurisconsults, in their desire to afford the wife every facility for escaping from an irksome matrimonial tie, have prescribed the following rules on the subject of compensation for *khulâ*. It is declared:—

(1) That when a *khulâ* has been entered into, or has been granted in consideration of payment by the wife of things that are *harâm*, or unlawful under the Islamic Law, such as wine, pork, carrion, &c., the *khulâ* is valid, but the stipulation is void. In such cases, the *Fatâwa Alamgiri* says: "A separation is established

[1] The woman can retract her consent to give the indemnity any time before the agreement is finally concluded; *Radd-ul-Muhtâr*, Vol. II, p. 920. It is absolutely incumbent that the woman should understand the terms.—*Ibid.*

[2] The *Sharâyâ-ul-Islâm* says: "If a man should enter into a *khulâ* with his wife for a specific article which proves to be the property of another, it has been said that the *khulâ* is void; but it is better to hold that the *khulâ* is valid, and the man is entitled to the value of the specific article, or something similar to it, if it belong to the class of similars," p. 330.

[3] *Fatâwa Alamgiri*, Vol. I, p. 675; *Hedâya*, Vol. I, p. 318.

[4] *Sharâya*, p. 329.

between the parties, but none of the *things* specified are obligatory on the wife, nor has she to restore any part of the dower;" the presumption of law being that when the husband, knowing that the articles were *harâm*, agrees to accept them as indemnity, he cannot be supposed to have any intention to exact the exchange, and consequently is debarred from bringing forward a claim with respect to those articles, or demanding their value if they are destroyed by the public censor (*muhtasib*). In the same way, if the wife agree to give in compensation stolen property, known by the husband to be stolen, the separation would be valid but the stipulation void, and the husband would have no right to proceed against the wife if the articles be restored to the rightful owner.

Under the Shiah Law, it is the same. "If the indemnity consist of things which cannot be legally possessed by the professors of Islâm, such as pork, &c., the *khulâ* is void, giving rise to the presumption of a divorce without indemnity if the *sighèh* of divorce or *talâk* has been pronounced; but, if the *sighèh has not been* pronounced, the divorce would be absolutely null."[1]

(2) A *khulâ* may be entered into, under the Sunni Law, for things of an indeterminate value, such as the young of an animal not yet born.[2]

On this point there seems to be some divergence between the Shiah and the Sunni doctrines; for the *Sharâya* says: "When the indemnity consists of the young of an animal not yet born, the *khulâ* is not valid."[3] But several examples given in the *Jâmaa-ush-Shittât* leave the matter involved in doubt.

(3) The personal engagement of the wife to provide her own maintenance during her pregnancy, or to renounce her right of *hizânat* over her children, &c., may, according to all the schools, form the subject of indemnity for *khulâ*.

"If the indemnity," says the *Sharâya*, "be the suckling of the husband's child, it is valid, but the time during which it is to last must be distinctly specified; so also, if a man should give a *khulâ* for the child's maintenance, it would be valid."[4]

An engagement by the wife to nourish the child must be for *more* than two years; if she agrees to suckle it for two years or

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[1] *Jâmaa-ush-Shittât.*
[2] Al-Karkhi.
[3] *Sharâya*, p. 329.
[4] *Ibid*, p. 329.

less, it would be no sufficient indemnity, as she is bound by law to suckle it for two years.

The indemnity is fixed by mutual agreement. The terms must be settled voluntarily on both sides. "If a man should *compel* his wife to take a *khulâ*, he would do what is unlawful; the separation would be valid, without any obligation on her part to any indemnity."[1]

In early times, when the dower was invariably *prompt*, the indemnity for *khulâ* was also required to be paid immediately when the arrangement for the dissolution of the marriage contract was entered into. At the present day, it is not considered necessary that the compensation should be paid when the *khulâ* is given, if a time for its payment is distinctly stated; it has even been held allowable on the part of the wife to agree to pay the amount upon her marriage with some other man.

Before proceeding further it may be as well to explain, who the parties are who may validly arrange a *khulâ*, and agree to pay the indemnity required.

In the first place, the woman herself; in the second, her relations, friends, and even strangers may, if authorised by her, demand a *khulâ* and enter into a composition with the husband. "Any person can," says the *Fatâwa Alamgiri*, "if especially authorised by an adult woman, enter into an agreement with the husband on her behalf."[2]

It has already been shown what the powers of a father are in respect of an arrangement made by him for a minor daughter, and it remains only to mention the extent of his authority to act for an adult daughter. A father may, with the permission or authority of his grown-up daughter, enter into a *khulâ* for her, agreeing to abandon on her behalf the dower settled on her. If a *khulâ* is arranged without her consent at the time, or subsequent sanction, and if the father has not become security for the compensation agreed upon, the transaction is not valid, and the *khulâ* is without effect. When the father has guaranteed the payment of the indemnity on his personal responsibility, then, unless the daughter subsequently ratifies what he has done, and takes the payment upon herself, she

[1] *Sharâya*, p. 331. "If a husband should grant a *khulâ* to his wife while their dispositions and tempers are still in harmony, the *khulâ* would not be valid."

[2] *Fatâwa Alamgiri*, Vol. I, p. 585.

is entitled to proceed against her husband for her dower, and he has a right against the father.[1]

Shiah doctrines.

Under the Shiah Law, the husband has no right to proceed against a *wakîl* or the father, when the former has exceeded his authority, or the latter has acted without express authorisation from his daughter. In either case her right to dower remains intact, and the *khulâ* takes effect only as a single *talâk* with option of revocation on the part of the husband.[2]

When indemnity for *khulâ* unlawful.

When a compensation or indemnity has been unlawfully received by the husband, he is bound to restore it.

An indemnity is unlawful (1) where the marriage is liable to be annulled for *initial* illegality ; (2) where the marriage is annulled, in exercise of the right of option possessed by the wife ; (3) where the husband has taken the initiative, and given her a *talâk ;* and (4) where the wife has the right of demanding a separation from a Court of Justice.

In a case which was decided by the Kâzi of Constantine in Algeria on the 2nd of August 1863, the husband was ordered to repay the indemnity to the wife from whom he had separated under aggravating circumstances. The wife, it appeared, was so cruelly ill-treated that she was compelled to release herself from the marriage tie by paying her husband four hundred francs ; in fact, the husband appears to have forced her to take a *khulâ*. After the divorce, she sued the husband for the four hundred francs, which he had compelled her to pay him as compensation. The husband denied the charge of coercion and constraint, but the facts being proved conclusively, the Kâzi upheld the divorce and ordered the immediate restitution of the sum which he had obtained from the woman.[3]

Difference between the Shiahs and Sunnis.

It will not be amiss to point out here the difference between the Shiah and the Sunni schools regarding a *khulâ*, taken by a woman under the influence of threats. Under the Shiah Law, when a man *forces* his wife to a composition with him for a *khulâ*, the separation takes effect only as a *reversible* divorce without any obligation on her part to pay the compensation. Under the Sunni Law, however, it operates as a *definitive talâk*.

Mubârât.

The difference between the Sunnis and the Shiahs regarding

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[1] *Fatâwa Alamgiri*, Vol. I, p. 686. [2] Sautayra, pp. 329-333.

[3] Sautayra ; see also *Fatâwa Alamgiri*, Vol. I, p. 249.

mubârât has been partially mentioned in a preceding page. Some further remarks will not be out of place, in order to show the extreme jealousy which the Shiah Law evinces against a capricious exercise of the power of divorce which is vested in both husband and wife.

Mubârât (in law) signifies mutual discharge from the marriage-tie. Under the Sunni Law, when both the parties enter into a *mubârât*, all matrimonial rights which they possess against each other fall to the ground.[1]

The same conditions are required for the validity of a *mubârât* as in the case of *khulâ* or *talâk*.

With the Shiahs, it is necessary that *both* parties should, *bonâ fide*, find the matrimonial relationship irksome in order to justify their entering into a *mubârât*. If there be no mutual aversion, the *mubârât* would be invalid. Shiah doctrines.

In *mubârât* also, the *sighèh* must be pronounced *expressly* (according to the Shiah Law). The *sighèh* of *mubârât* is بارینک علی کذا وانت طالق "I have discharged you from the obligations of marriage for (such a sum), and you are separated (from me)." If the husband were simply to say, بارینک, without using the words وانت طالق, the entire proceeding would be invalid ; whilst if he simply say, *anti tâlikun*, without using the expression about the "discharge," it would take effect as a *talâk* and he would be liable for the dower. The *Sharâya*, however, adds that when there is inability to use the Arabic language, or when the parties are not cognisant of the technicalities of the law, attention must be paid to their intention. If it be clearly evident from their conduct and their words that "a mutual release" is intended, it would take effect as such, though the exact expressions may not have been used.[2]

In all cases where the formalities have been duly complied with, the *sighèh* has been pronounced, established, and proved, the proceeding is tantamount to a *talâk-ul-bâin*.[3] It *definitively* dissolves the conjugal union, and the husband has thenceforward no power over his wife. "When the husband receives a compensation from the wife," says Al-Karkhî, "the divorce is *bâin*, and even when it is without compensation and (consequently) *rajaï* (reversible at the

[1] *Hedâya*, Vol. I, p. 323.; *Fatâwa Alamgiri*, Vol. I, p. 669.

[2] *Sharâya*, p. 333.

[3] Sautayra, Vol. I, p. 250.

option of the husband), if during the wife's *iddat* he accept from her a compensation, the separation would be equally *bâin*."

In case of dispute between the husband and the wife regarding the *terms* of the composition for *khulâ* or *mubârât*, generally "the word is with her," that is, her statement is to be preferred, and the *onus probandi* will primarily be cast upon the husband.[1]

Khulâ. When a wife admits obtaining a *khulâ* from her husband on condition of paying an indemnity, but alleges that she was forced to do so by her husband, the onus of proving the allegations of coercion would rest on her.[2]

When a *khulâ* has been entered into, and the terms of composition settled, any addition made to the indemnity is void.

If a woman should enter into a *khulâ* on condition of maintaining the child of the union until it attains puberty, the *khulâ* would be valid if it be a female child, but not so if it be a son.

Should a woman authorise a *wakîl* or an agent to enter into a *khulâ* with her husband for five hundred dirhems, and the *wakîl* were to exceed his authority and enter into a composition for one thousand, the *khulâ*, according to Al-Karkhî, would be valid, and the woman would be liable only for the sum which she authorised her agent to offer.[3]

Shiah rule. A different rule, however, is in force among the Shiahs. "When a woman," says the *Sharâya*, "appoints an agent to enter into a *khulâ* on her behalf without expressly defining his authority, the indemnity must not exceed her customary dower, *viz.*, the *mahr-ul-misl*. If a sum in excess of the amount of the dower is agreed upon, it is void, and the separation takes effect as a *talâk-ur-rajaï*, without the agent being held responsible."

The woman is entitled at any time before the *iddat* to "reclaim" the indemnity, when the *khulâ* would change its character and become a *talâk-ur-rajaï*.

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[1] *Fatâwa Kâzi Khân*, Vol. II, p. 124; *Fatâwa Alamgiri*, Vol. I, p. 678. The technical differences drawn between different forms of speech, examples of which are given in the two *Fatâwas*, may be left out of consideration for general purposes, for, with unimportant exceptions, when the fact of the divorce or separation is admitted, and the only dispute is as regards the terms, the onus is on the husband; but when the fact is disputed, *i.e.*, when the husband denies the divorce, the onus lies on the wife.

[2] *Ibid.*

[3] This is under the Sunni Law.

CHAPTER XIV.

DISSOLUTION OF THE STATUS OF MARRIAGE BY A DECREE OF THE JUDGE.—FOR WHAT CAUSES.—LAAN.—DIFFERENCE AMONG THE SCHOOLS.

ACCORDING to the Sunni and Shiah schools, when the married parties have no tangible cause of complaint against each other, but a mutual aversion due to incompatibility of temper, want of sympathy, &c., they can dissolve the marriage tie by mutual agreement.[1] When the husband is guilty of conduct which makes the matrimonial life intolerable to her, when he neglects to perform the duties which the law inposes on him as obligations resulting from marriage, or when he fails to fulfil the engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the Hâkim-ush sharaa and demanding a divorce by authority of justice.

The Hâkim-ush-sharaa or Kâzi has the power of granting a divorce not only for habitual ill-treatment, for non-fulfilment of ante-nuptial engagements, for insanity, but also for incurable impotency existing prior to marriage.

The power of the Kâzi or Judge to pronounce a divorce is founded on the express words of Mohammed: "If a woman be prejudiced by a marriage, let it be broken off."[2] The Shiah *Bihâr-ul-Anwâr* also lays down that in case of *nushûz*[3] or *shekâk*,[4] arbitrators may be appointed to settle the disputes, or the Judge may intervene; and if no settlement can be effected, the marriage ought to be dissolved.

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[1] As already pointed out, the Mutazalas refuse to give to the parties to a marriage contract, or to either of them, the faculty of dissolving the union without submitting their disagreement to the decision of the Judge; and they rely upon the words of the Prophet himself as showing the necessity of this course.

[2] *Sahîh-ul-Bukhârî.*

[3] Refusal to fulfil conjugal duties.

[4] Violence, cruelty, disagreement, etc.

During his own lifetime, the Arabian legislator had several times to enforce the principle in cases which arose among his followers. One notable instance has furnished an authoritative precedent for the legists of Islâm. Sabia bint Hâris, who was married to Amr, suddenly left Mecca and took refuge in the Moslem camp. Her husband was desired to follow her, which he persistently refused to do. His marriage was thereupon annulled, and Sabia was allowed to contract a union among the people she had joined.

The obligations, which are imposed on the husband by the status of marriage, have been sufficiently explained in a previous chapter. For further details the curious student of the Mahommedan Law is referred to the *Kitâb-ul-Mustatrif*.

Divorce by act of justice, as mentioned before, may be claimed whenever the husband neglects to perform his obligations. It may also be claimed when he refuses to fulfil the terms of the contract, or when he is unable to consummate the marriage. Furthermore, it may be claimed if the husband slander his wife, or pronounce an injurious assimilation against her; for example, if he compare her to his mother or any other female relation within the prohibited degrees (*zihâr*), or if he take a vow to abstain from her for four months (*ilâ*).

The cases decided by the Algerian Courts,—numerous instances of which are given by Sautayra and De Ménerville,—show that a wife is entitled to a divorce for the following, among other, reasons:—

(1) When the husband leaves her without any means of subsistence.

(2) When he deprives her of her raiment.

(3) When he forces her to beg for her living.

(4) When he allows her to suffer from starvation or want.

(5) When he quits the conjugal domicil without making any provision on her behalf.

(6) When he persistently neglects to visit her.

(6) When he forces her to labour at work of a kind which is considered degrading to a woman in her position.

(8) When he does not provide her with a habitation.

(9) When he has several wives and does not treat them all equitably.

(10) When he treats her habitually in a cruel manner.

(11) When he is in the habit of beating her or threatening her with bodily injuries.

These causes entitle a wife to claim a divorce, even where it appears that the means were resorted to, with the object of forcing her to enter into a *khulâ*.

According to the Hanafîs, mere inability to provide maintenance is not a sufficient ground for asking for a divorce. When the husband is possessed of means and is able to provide for the support of both himself and his wife, and wilfully refuses to do so and neglects her, then only can she apply for a divorce. The Hâkim-ush-sharaa has the power of granting a divorce, when the refusal or neglect is wilful and unjustifiable. But if the husband be indigent and has neither the means to provide for her support nor ability to work, she cannot obtain a separation as a matter of right. Under the Shâfeï Law inability to provide maintenance, wilful or otherwise, is a cause for which the Kâzi may dissolve the marriage.[1]

The refusal to maintain, in order to entitle a woman to obtain a divorce, must be a continuing offence, and must not refer to past conduct. When the husband expresses at the time of application his willingness to maintain the wife, and it appears to be *bonâ fide*, she is not entitled to a separation, though the Kâzi has a discretion in this case.

Arrears of maintenance are not due unless there is an order of the Magistrate or Kâzi fixing the amount, or the rate has been previously determined by private agreement between the parties. In these cases the wife may recover the arrears due by an action in the Civil Courts.

If the husband has abandoned the conjugal domicil without taking any measures for the support of the wife during his absence, or if he has left her absolutely without any means to support herself, the wife is entitled to apply to the Kâzi for a divorce. Upon receiving her application, the Hâkim-ush-sharaa is authorised to adjourn the case for thirty days, and to issue a notification for the appearance of the defaulting husband, or some person or persons on his behalf. Should an appearance be entered either by the husband or any other person acting on his behalf, the Kâzi would

Desertion.

[1] See *ante*, pp. 363-365.

direct an inquiry regarding the truth or falsity of any defence that might be urged. In default of such appearance, or on failure by the husband or his representatives to show that the wife has sufficient means to maintain herself with, the Kâzi is authorised to make the order for a divorce.

Should the husband, however, have left any property either in the hands of the wife, or in trust, or in deposit, or invested in trade or partnership, the Judge has the power to order that the woman's maintenance should be provided from such property, or from the income thereof.

The onus in all these cases lies, in the main, on the wife, to prove that she has been deserted and left without means.

The order for divorce is always made subject to the option of the wife. She may either continue subject to the conjugal rights, or accept a separation on the ground of desertion. If she accept a separation, it would take effect as a definitive divorce.

If the absent husband can himself, or through others, provide his wife with maintenance, she would not be entitled to a separation, unless his absence amounts to *desertion* within the meaning of the Mahommedan Law.[1] If an offer should be made by the husband's father to maintain the wife, the same conditions regarding the amount and its mode of payment would apply, as in the case of the husband himself.

Neglect. Equality and justice being essential conditions in the treatment of wives, should a husband, who has more than one wife, neglect his duties towards any one of them, that one would be entitled to a separation in consequence of the neglect.

Ill-treatment. The Court of Algiers has held that when a husband habitually uses vile expressions towards his wife, it is a sufficient cause for divorce. In the same way, if he accuses her of having led an immoral life previous to her marriage, she would be entitled to a separation. She is equally entitled to a separation, when he charges her with unfaithfulness to him and yet refuses to establish the accusation by a formal proceeding (*laân*).

The wife has a right to apply for and obtain a divorce when the husband habitually insults her parents or her relations, or leads an

[1] The Mahommedan Law insists that cohabitation is a mutual obligation on the parties. If the husband were persistently to refuse to cohabit with his wife, this would amount to desertion.

infamous life, or associates with women of evil repute, or attempts to force her to lead an immoral life and take up her abode with prostitutes, or introduces a concubine into the conjugal domicil, or threatens to kill the wife, or beats her, or disposes of her property, or makes her life miserable by cruelty of conduct, even when it does not amount to physical ill-treatment.

A simple allegation of the wife, unsupported by independent testimony, is not sufficient in law to establish any of the charges above-mentioned. When her statement is supported by the evidence of trustworthy witnesses, or corroborated by outward marks of cruelty, the Kâzi is bound to grant her a separation.

Cruelty a ground for cancellation.

It is no defence to a claim for divorce on the ground of cruelty, that the cruelty was the result of the wife's own conduct. For example, if a man were to say that he beat the wife cruelly because she blasphemed the Mussulman religion, or because she was unfaithful to him, it would not be a sufficient defence in law.

A judgment of the Kâzi of Algiers, upheld by the Superior Court, throws considerable light on this branch of the subject. The husband, in the case referred to, had beaten his wife so severely that he wounded her in two places. Before the Kâzi he urged that he inflicted the beating because she allowed a stranger to visit her during his absence. The Kâzi, after examining the wounds, declared that, notwithstanding the wife's adultery, the husband had exceeded his correctional powers, and therefore the woman was entitled to a divorce.

Failure to carry out the stipulations of the marriage contract.

A separation by decree of the Judge can take place, also, when the husband fails to carry out or to abide by the terms of the matrimonial contract. All the lawyers agree in holding, that when the husband recedes from his engagements, or refuses to act in conformity with them, the wife is entitled to a divorce. The conditions (*shurût*) or stipulations, which may be validly entered into at the time of marriage, have been already pointed out.[1] The most frequent of these conditions is, that the husband shall not take a second wife during the continuance of the first marriage. Should the husband, acting contrary to this express stipulation, contract a second union contemporaneously with the first, the first

[1] See Chapter on *Marriage*.

wife would be entitled to a divorce, and the husband would become liable for the whole of the deferred dower.[1]

In considering this branch of the law it is well to mention the fact, that while the French in Algeria have, with remarkable foresight, utilised the indigenous institutions and used them as so many levers for the improvement of the Algerian people, the British in India, with hardly commendable wisdom, have persistently and characteristically ignored or abolished the old institutions, which they found existing in Hindustan when they seized the government of the country. The Kâzis' Courts, which dealt with the matrimonial cases of the Moslems, have, with many other useful institutions, been swept away by the iconoclastic movement inaugurated under the British rule. The difficulties which were settled formerly by a simple reference to the Kâzi, without employment of advocate or pleader, now eat into the core of Moslem society without remedy or cure. To give an example, if a husband at the time of his marriage made a stipulation with his wife that he would not contract a second union during her life-time, and subsequently infringed the stipulation validly entered into, the Kâzi had the power to compel him to abide by his agreement or to dissolve the first marriage on the application of the prejudiced party. Under the British rule, there is no machinery for affording the latter relief, though probably a wife may apply to the Civil Courts for, and obtain, an injunction to restrain the husband from infringing the terms of his contract with her.

Badarunnissa v. Mafiatulla.

In the case of *Badarunnissa* v. *Mafiatulla*,[2] it was held that if the wife divorced herself under a stipulation of the character referred to, a suit on the part of the husband for restitution of conjugal rights would not lie.

Breach of the stipulations.

The wife is entitled to a separation not only for non-fulfilment of ante-nuptial agreements, but also for breach of any stipulations which may have been entered into, with the sanction of the Kâzi, after marriage between the husband and herself. For example, where the husband has bound himself before the Kâzi not to illtreat the wife any more, or to provide her with separate maintenance,

[1] This provision of the law acts as a practical check on polygamy even among those Mussulmans who recognise it as lawful. The difference between the archaic sects and the Mutazalas has been pointed out in a previous chapter.

[2] 7 Bengal L. R., A.C., p. 227.

and he fails subsequently to keep to his engagement, the wife would have a right to ask for a divorce.

Would a wife be entitled to a divorce in a case where the husband's absence is involuntary, for example, when he is in prison?

An order of the Court of Algiers, dated the 19th of July 1865, has authoritatively settled the question. It declares that, "under the Mussulman Law, a wife of an individual detained in prison has not the right of obtaining a divorce by the mere fact of his imprisonment, if she receive during his enforced absence her proper maintenance."[1]

In another case, the same Court, upsetting the judgment of the Kâzi, made an order to the following effect:—"The Kâzi is in error in applying the principles of the Mussulman Law relating to a husband who has disappeared to the present case; for, in point of fact, the husband Ahmed bin Kara has not disappeared; that it is known where he is at the present moment; that news has been received from him; that she has up to this time received her maintenance from the husband's brother; she is accordingly not entitled to a divorce,—the order of the Kâzi is therefore set aside."

Ali Yezîd al-Kazwînî and Ali Abu'l Hassan, two Shâfeï jurists, are of opinion that when the imprisonment lasts over five years, the wife has the right of demanding a dissolution of her marriage and, after the necessary *iddat*, of contracting a fresh union.

The Shiahs hold that in case of a husband's disappearance, a woman is entitled to re-marry after four years, if during that period no trace of him has been found.[2] The Mâlikîs and Hanbâlîs agree with the Shiahs, but the Shâfeïs require that the woman should wait for her husband's return or reappearance for seven years, after the lapse of which period she is entitled to re-marry by authority of a rescript or order from the Kâzi.

Abû Hanîfa's doctrine is so startling that even the followers of his school are obliged to conform to the Mâlikî teaching instead of

[1] Sautayra, Vol. I. p. 265.

[2] The *Jâmaa-ush-Shirtât* says: "An order from the Hâkim-ush-sharaa must be obtained before the second marriage is contracted." In India, it is probable that a declaration made before the Magistrate to the effect that the husband had disappeared for four years without leaving any trace behind, would be sufficient to satisfy the requirements of the law; for the order of the Magistrate is not necessary to give validity to the marriage, but simply to attest the *bonâ fides* of the wife and the new husband. See *ante*, p. 366.

his own. He declares that a woman ought to wait one hundred and twenty years!

Abû Yusuf and Mohammed are no less unreasonable in their views; according to one, the term is ninety years; and to the other, seventy years.

The Hanafî lawyers, in order to escape from the absurdity of the position into which the dicta of their masters lead them, invariably decide cases arising among their own sect according to the Mâlikî principle. When a husband is proved to have been a *mafkûd-ul-khabar*[1] for the space of four years, and the woman has applied and obtained a rescript from the Kâzi, she may lawfully contract a second union.

Zihâr.

In early times, and before the promulgation of the Islâmic law and faith in the peninsula of Arabia, it was customary among the Arab husbands to repudiate their wives and cast them adrift on the world by calling them mothers or sisters. The frequency of repudiations by "injurious assimilations," to use the felicitous expression of M. Sautayra, had assumed a mischievous magnitude at the time of the Prophet's appearance, and had tended to degrade the morality of the Arab tribes beyond any other custom, excepting, perhaps, the custom of *Nikâh-ul-makt*, "the abominable marriages."

The Prophet expressly forbade the use of "injurious assimilations," or vile expressions of any kind towards the wife. A husband making use of such expressions rendered himself liable to expiation. The usual expiation for the sin of vile language used towards the wife, consisted in enfranchising a slave, or feeding the poor, or fasting for two months.

Should the husband compare his wife to his mother or sister, or *any other female relation within the prohibited degrees*, expiation would become incumbent on him *only* if the comparison or "assimilation" was intended "disrespectfully." "If he declare," says the *Hedâya*, "that in making the comparison his intention was only to show respect to his wife, no expiation would be necessary."[2]

The custom of repudiation by the use of "injurious assimilations" had taken such deep root in the manners of the pagan Arabs, that, in order to nullify the evil consequences resulting therefrom, and

[1] See *ante*, p. 88.

[2] *Hedâya*, Vol. I, p. 306.

thus in process of time to throw it into desuetude, the Founder of Islâm prescribed the rules which are embodied in legal treatises, but which, on the whole, have no practical importance in the present day. Their only real value consists in the fact that they enable us to perceive the circumstances under which a woman, who is subjected habitually to gross and vile expressions, would become entitled to a separation on that ground alone. The habitual use of language of the character above described is considered as an outrage on public morals and the decency of married life ; a woman, therefore, to whom any expression of an immoral character has been used, has the option, under the Sunni Law, of asking for a dissolution of the marriage tie by an order of the Kâzi, unless the husband formally expiates the sin in the way pointed out.

Under the Shiah Law, the Judge has not the power of dissolving the matrimonial relationship on the ground of the wife having been "disrespectfully and vilely" compared by the husband to a female relative of his within the prohibited degree. The *Sharâya* says : "If a vile expression (*zihâr*) be used towards a wife, she may choose either to submit to it, in which case no other person has a right to object to her doing so, or she may bring the matter before the Judge. When she adopts the latter course, the husband must be allowed to choose, whether he will make an expiation or separate from his wife, and three months is to be allowed him to make up his mind. The Judge, however, has not the power, should the husband allow the time to expire without doing either of these things, to compel him to divorce the wife, or to grant a dissolution by a decree of the Court." [1]

Ilâ, the Vow of Abstinence.

Like *zihâr*, the custom of *îlâ*, or *the vow of abstinence*, which was in vogue, as well among the pre-Islâmic Arabs as among the Hebrews and Christians settled in Arabia, has fallen into complete desuetude ; but as reference is made to it in Mussulman works of law, attention may briefly be drawn to the subject in these pages.

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[1] *Sharâya*, p. 335. All these rules have now only a historical interest, as throwing considerable light on the manners and customs of the Arabs in the time of the Prophet. The term *zihâr* is as unknown in Mussulman society, now-a-days, as it is among foreigners. It must not be supposed, therefore, that because there exist directions in legal treatises against the use of injurious expressions towards a wife, such expressions are habitual among Moslems.

Prior to the Islâmic legislation, a vow of continence made by a husband, and kept inviolate by him for a certain length of time, took effect as an absolute repudiation. The wife had no voice in the matter. Custom recognised no right on her part to question her husband's faculty to divorce her in this manner.

The Prophet of Islâm stigmatised this custom as a gross outrage on the wife. As in the case of *zihâr*, a husband who took such a vow laid himself open to the penalty of expiation, if he resumed intercourse in the interval and before the expiration of the term of the vow. The term of *îlâ* is four months. A vow for less than this space of time is of no effect in the eye of the law. If the *îlâ* is kept inviolate for four months, the Hanafî Law presumes that the husband has no intention of resuming cohabitation, and attaches to the vow the effect of a definitive and complete separation. The husband loses, after the lapse of this period, all conjugal rights over the wife, who, on her side, becomes entitled, should the husband desire to resume cohabitation, to claim a dissolution of the marriage by an order of the Kâzi, who can make an order dissolving the marriage.

Hanafi Law.

Under the Shiah Law, an *îlâ* kept inviolate for four months takes effect only as a *reversible* or *rajaï* separation. The parties are at liberty to resume intercourse whenever they like. Nor has the Hâkim-ush-sharaa, among the Shiahs, the power which the Kâzis possess among the Hanafis. He has no power to compel the husband to divorce the wife, or to dissolve her marriage by a decision of his *mahkama* (Court). But when the man is recusant and refuses restitution of conjugal rights as well as a separation, and thus seriously prejudices her interests, the Hâkim has the power of imprisoning and "straitening" him, until "he either returns to her or grants her a divorce."[1]

Shiah doctrine.

Laân.

Under the Mussulman Law, a charge of adultery preferred by a husband against his wife can only be established by the direct testimony of four witnesses to the fact. From the nature of the offence, however, the cases in which ocular and direct evidence is available are extremely rare In order to obviate the evils which would necessarily result from a denial of all redress to the injured

[1] *Jâmaa-ush-Shitfât.*

husband, in those numerous instances where he is morally convinced of the guilt of his wife, but has no direct testimony to establish it, or when he alone is cognisant of the fact, the law has prescribed the proceeding by *laân*.

It must be added, however, that in prescribing the proceeding by *laân*, the law has in view not only the interest of the husband but also that of the wife.

Under the Mussulman Law, a person who slanders another is liable to the *hadd-ul-kazf*, "the specific punishment for scandal." But when a man maligns his wife and accuses her of adultery, in the majority of cases he escapes the punishment usually inflicted for slander. In order, therefore, to subject the slanderer to some definite penalty for an unjustifiable accusation, as well as to enable the wife to clear her character by a public and solemn denial of the charge (*dafaa-ul-aâr*), it was provided that when a charge of adultery was made against a woman, the accuser and the accused were bound to proceed to the Kâzi, and mutually take the sacramental oath prescribed by the law.

As M. Sautayra points out, in countries where the Mahommedan Law is not in force, the proceeding by *laân* has fallen into disuse. The Algerian Kâzis, notwithstanding that the practice of *laân* is becoming obsolete, still continue to administer the Mussulman Law in those cases where the parties choose to institute the proceeding.

The Procedure of Laân.

The disapprobation with which the proceeding of *laân* is regarded by Moslem jurists, is shown by the directions contained in the *Sharâya* and the *Fatâwa Alamgiri*. The *Sharâya* says: "It is not lawful for a husband to accuse his wife on a mere supposition of guilt;" and the *Fatâwa* directs that when the accuser and the accused appear before the Kâzi, he should admonish them to abandon the proceeding. Should they persist, one in making the accusation and the other in insisting upon the charge being proved, then alone should the Judge administer to them the sacramental oath prescribed, "invoking the curse of God" upon each other.[1]

Under the Shiah Law, it is only when the husband has no evidence to offer but his own, that he may proceed by *imprecation*

[1] *Fatâwa Alamgiri*, Vol. I, pp. 698; *Fatâwa Kâzi Khân*, p. 153; *Fusûl Imâdiya; Sharâya*, pp. 348-349.

against the wife. Under the Sunni Law, he may, even when he has corroborative testimony, institute the proceeding by *laân*.

Laân may be instituted by the husband with two objects,—either to establish a charge of adultery against his wife, or to disavow the parentage of a child born in wedlock, which, again, resolves itself into an accusation of unfaithfulness to the marriage bed on the part of the wife. As the conditions requisite for the validity of the proceedings in the two cases are slightly different, it is as well to consider them separately. For instance, under the Shiah Law, *imprecations* can be mutually pronounced in the affirmation and denial of an accusation of adultery, *only when* the husband alleges that *he has had ocular demonstration of the fact but has no other proof of it*.[1] "It follows from this," says the *Sharâya*, "that there can be no *laân* for a *charge of adultery* in the case of a blind man, though he may make an *imprecation* for the *disavowal* of a child.[2]

All the schools agree in requiring that the husband who institutes the proceeding by *laân* shall be adult and sane. The Sunnis insist further that he shall be a Mussulman. The Shiah treatises do not expressly mention that Islâm is a necessary qualification on the part of the husband, and the cases cited in the *Jâmaa-ush-Shittât* leave it in doubt, whether a *zimmi* husband is qualified to take the *laân*. Judging by analogy, however, it would seem that non-Moslem subjects of Shiah States would not be denied the power of instituting a proceeding by *laân*, if they were not proclaimed atheists.

Under the Hanafî Law, "only those persons who are competent to give testimony in Court are competent to take the *laân*."[3] "So that," continues the *Fatâwa Alamgiri*, "it cannot be taken by the married parties when either or both of them have previously undergone the specific punishment for slander, or when one is an absolute slave, or an infidel, or dumb, or under puberty, or mad."[4] The blind and the deaf, however, are not precluded from taking the *laân*.

Among the Hanafîs, it is required, further, that the wife should be a Moslemah of chaste character (*muhsina*). "When she is a

[1] *Jâmaa-ush-Shittât*; *Irshâd Allâmah*; *Sharâya*, pp. 346-347.

[2] *Sharâya*, p 347.

[3] *Fatâwa Alamgiri*, Vol. I, p. 698.

[4] *Ibid.*

person of loose character, or the parties have lived together only under a semblance of right," she is not entitled to claim the benefit of the proceeding by *laân*.

The Shâfeïs and the Mâlikîs agree with the Shiahs in allowing the dumb to take the oath of imprecation.[1] "The imprecation by the dumb is valid," says the *Sharâya*, "when their meaning can be ascertained by intelligible signs." Shâfeï and Mâlikî doctrines.

The Shiahs agree with the Hanafîs in requiring that the wife should be a person of irreproachable character, in order to take the *laân* validly. They, however, go further than the Hanafîs in holding that she should be adult and sane and "free from deafness and blindness." In making Islâm a condition on the part of the wife, they are in agreement with the Hanafîs.[2] Shiah rule.

Among the Hanafîs, if a man slander his wife who is a *zimmia* (non-Moslemah) or a slave, he cannot be subjected to the formality of imprecation. Under the Shiah Law, "*laân* is established between a free man and a slave wife, so that if he were to malign her he would be liable to *imprecation*."[3]

The Shafeïs and the Malikîs agree with the Shiahs with reference to the latter principle. They make no difference between the free and the slave, in the exercise of the right of *laân*. Among them a *zimmia* or non-Moslemah occupies the same position in the eye of the law as a Moslem woman. They differ from the Shiahs and the Hanafîs, in holding that the mere fact of a woman being a person of questionable character ought not to debar her from taking the oath of imprecation, or exempt her husband from establishing formally the accusation he brings against her.

According to the Mâlikîs and the Shâfeïs, when a non-Moslemah wife is charged with adultery, she is entitled to take the oath in the church, if she be a Christian, and in the synagogue, if a Hebrew.

Under the Shiah Law, when the husband is able to produce testimony, but declines to do so, he is not entitled to proceed by imprecation. When he swears that he actually saw the wife in the guilty act, but has no corroborative evidence, the oath should be

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[1] *Hedâya*, Vol. I, p. 351; *Sharâya*, p. 348; *Kitâb-ul-Anwâr*.

[2] The Usûli Shiahs and the Mutazalas apparently differ from the Akhbâris on this point. They seem to hold that it is not necessary that a woman should be a Moslemah in order to exercise the right of *laân*.

[3] *Jâmaa-ush-Shittât*; *Sharâya*, p. 348.

administered to him and to the wife respectively. If the husband refuse to take the oath, he makes himself liable to the punishment for slander. If the wife refuse to take the oath, the Kâzi is authorised to dissolve the marriage by a formal decree issued under his hand and seal. "It is a condition of *laân* that the wife should demand it; and if the husband refuse to take the oath, the Judge is empowered to imprison him until he submits or retracts, in which case he becomes liable to the punishment for slander. Similarly, if the woman prove contumacious, and refuse to take the oath, the Kâzi has the power of sending her to prison until she takes the oath, or admits her guilt." These provisions of the Hanafî Law do not, however, seem to be enforced by the Hanafî Kâzis of Algeria, whose decisions alone furnish us with leading principles. In a case decided by the Kâzi of Bôn, on the 17th of September 1822, the proceeding was instituted by the husband.

The Legal Consequences Resulting from the Proceeding by Imprecation.

When both parties have taken the oath in the prescribed form, or the charge has been conclusively established, the Kâzi must draw up an order of separation between the parties; and in accordance with such decree, the husband must divorce his wife. If he refuse to do so, the Judge himself is to pronounce a divorce between them. The marriage, however, continues in existence, with all its concomitant rights until the Judge has made the order.

All the schools are agreed in the opinion that a proceeding by *imprecation* can be validly effected only before the Kâzi or Hâkim, and that until he has made his order dissolving the marriage it continues intact. There is a passage in the (Shiah) *Sharâya* which leads to the inference, that if the parties were to appoint a private individual as arbitrator, his decision or award would have the same legal and binding effect as that of the authorised Judge.[2]

The cases in the *Jâmaa-ush-Shittât*, however, point to the conclusion, that the proceeding should be instituted in the *Murafâi-Mujtahid-i-Sharaa* (in the Court of the *Mujtahid-i-Sharaa*, otherwise, the lawfully constituted Judge).

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[1] Sautayra, Vol. I, p. 322.

[2] *Sharâya*, p. 349.

[3] *Hedâya*, Vol. I, p. 349; D'Ohsson, Vol. III, p. 112; *Sharâya*, pp. 349-351; *Kitâb-ul-Anwâr*; *Fatâwa Alamgiri*, Vol. I, p. 640.

Under the Shâfeï, the Mâlikî, and the Shiah doctrines, parties separated by an order of the Judge in a proceeding by imprecation "are perpetually prohibited to each other,"[8] that is, they are debarred from re-marrying. Under the Hanafî Law, however, if the husband retracts the accusation and undergoes the punishment for slander, or if it is found subsequently that, at the time of the proceeding, one or the other of the two parties was labouring under some *legal disability* which would have invalidated the *lâan*, or if either of them should apostatise and then return to Islâm, they can contract a re-marriage.

Disavowal of child.

The formalities required for a *lâan* in order to constitute a valid disavowal of a child, are the same as those observed when the charge is one of simple adultery, the only difference being that the formula is varied to suit the requirements of the question.

It must be added, however, that it is not necessary to comply with all the formalities of *lâan* in order to obtain a valid dissolution of the marriage tie, on the ground of the wife's infidelity. In the case already referred to, decided by the Kâzi of Bôn, the husband appeared before that officer and preferred an accusation against his wife, who on being cited admitted her guilt. The Kâzi made a decree dissolving the marriage, and ordered the woman to reimburse the dower she had received from her husband.

Similarly, when a false accusation is preferred against a woman, and the husband is unable to establish the charge, the woman is entitled to claim a divorce from the Court. The two cases cited by Sautayra are conclusive on this subject. In the first case Yehia bin Mohammed accused his wife of misconduct. She denied the charge, and cited him before the Kâzi to establish it by formal evidence. On failure of the husband to do so, an order was made, at the instance of the wife, dissolving the marriage.

In the other case, which was decided by the Court of Algiers on the 13th of February 1871, the husband demanded a cancellation of the contract, on the ground that the wife had been guilty of immorality prior to her marriage. The wife denied his allegation and claimed a divorce. The husband failed to establish the accusation, and the Kâzi accordingly pronounced a divorce in favour of the wife.[1]

[1] Comp. Bishop *On the Law of Marriage and Divorce*, Chap. xix.

Talâk-ul-Innîn.

Impotency of the husband.

The right of the woman, under the Mussulman Law, to a cancellation of the marriage on the ground of her husband's impotency is similar in all respects to her right under the English Law. The analogy, especially between the Shiah Law and the English Common Law, is close enough to deserve the attention of the students of Comparative Jurisprudence.

The wife is entitled to claim a divorce on the ground of her husband's impotency, if she was unaware of the infirmity prior to the marriage. If she accepted the husband with a knowledge of the fact, that he was impotent and physically incompetent to consummate the marriage, she has no right of divorce.

If the infirmity supervened after consummation, the wife has no right to ask for a divorce.[1]

Sunni doctrines.

Under the Sunni Law, the wife is entitled to a dissolution of the marriage for what is called in English Law impotency *versus hanc.* It makes no difference in her right to obtain an annulment of the marriage, whether the incapacity of the husband is *only especial* in her case, and whether he is able to have sexual intercourse with other women or not.

Shiah doctrines.

There is considerable difference of opinion on this point among the Shiah jurists. One section agrees with the Sunni lawyers, whilst another holds that if the man be able to have intercourse with other women, but not with the wife in question, she has no right.

The wife's right to a cancellation of the marriage on the ground of the husband's inability to consummate the contract is not destroyed by delay, and the woman, therefore, is not bound to exercise her right immediately on becoming aware of her husband's infirmity. Even if she, after becoming aware of his impotency, raised a question and then remained quiescent for a considerable time or slept in the same bed with him, her right would not be extinguished.[2]

A claim for the dissolution of the marriage on the ground of impotency is to be preferred always before the Kâzi or the Hâkim-ush-shâraa.

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[1] *Radd-ul-Muhtâr*, Vol. II, p. 977. [2] *Ibid*, p. 981; *Fatâwa Kâzi Khân.*

A divorce granted by the *Fatwa* of the *mullahs* is absolutely illegal and invalid. The *Jâmaa-ush-Shittât* says, that no proceeding for divorce on the ground of physical incapacity is valid without recourse to the *murâfa* of the Hâkim-ush-sharaa.

When a woman prefers a charge of impotency against her husband, the Kâzi investigates the complaint and examines the parties. If the wife was, at the time of marriage, a virgin, a jury of matrons is empanelled to examine whether she is *virgo intacta*. If her assertion be found to be true, the case is adjourned for a year commencing from the date of the order of adjournment if the husband be not a minor, or ailing from some temporary illness or in a state of *ihrâm*, *i.e.*, performing the actual pilgrimage to Mecca. If he be a minor, the period for consummation should be fixed from his attaining puberty; if ill, when he becomes convalescent, and when a *muhrim*, from after the pilgrimage.

If the husband should consummate the marriage in the interval, the wife's petition would be dismissed after the lapse of the period fixed by the Judge. If he, however, fail in his marital obligations, the wife is entitled to a divorce. The period so fixed is the lunar year of 354 days. And on this is the *Fatwa*.[1]

Delay on the part of the woman to apply again, or to bring the matter a second time before the Court, on the expiration of the period of adjournment, does not destroy her right. So long as there is no *copula*, her right remains intact; but cohabitation, though only once, would extinguish her right to obtain a cancellation on the ground of impotency.[2]

Under the Sunni Law, she would be entitled to her *full* dower in case there has been a *valid retirement* of the parties into the nuptial chamber. If there has been no *such* retirement, the Hanafîs allow her only a moiety of her dower. The Shâfeïs, in any case, give her only half the dower.

When the woman herself is not *apta viro*, she is not entitled to a divorce. If the woman is not a virgin, and the husband swear that he has had connubial intercourse with her, she has no right to a divorce.

A *majbûb* or a person, whose genital organ is mutilated which prevents a consummation of the marriage, stands on the same

[1] *Radd-ul-Muhtâr*, Vol. II, p. 979. [2] *Ibid.*

footing as an *inuîn*, whose inability to consummate the contract arises from physical weakness. But in the case of a *majbûb* the Kâzi has not to grant any adjournment as in the case of an *inuîn*, for, in the latter case, it is possible the infirmity may be cured, whereas, in the other case, it is not. Nor is the Kâzi to postpone the cancellation, though the husband is a minor, or ailing or *muhrim* for connubial intercourse being impossible owing to the mutilation, any delay is wholly unnecessary if the woman is adult.[1]

If the woman be insane, her *walî* would be entitled to ask for a cancellation; or, if she has no natural *walî*, the Kâzi should appoint a "plaintiff" for her, in other words, a guardian *ad litem*.[2]

If a child be born to a woman who has been separated from her husband on the ground of impotency within two years (the longest period of gestation according to the old legists)[3] from the date of cancellation, the separation would "drop," provided she has not married in the meantime somebody else to whom the birth of the child may be ascribed.

The Sunnis and the Shiahs are generally agreed regarding the procedure to be observed in a case of impotency brought before the Judge. According to the *Jâmaa-ush-Shittât*, an order of the *Mujtahid-ush-Sharaa*, who acts as Kâzi in Shiah countries, is always necessary. It ought to be added, however, that the *Sharâya* seems to hold a contrary opinion. It says, "True, in establishing impotence, a Judge is required to fix the period allowed to the man, in such cases, to test his inability, yet at the expiration of the prescribed period, the woman can cancel the marriage by herself if no cohabitation have taken place in the interval."[4]

The dicta of the *Jâmaa-ush-Shittât* is more conformable to right reasoning, and is generally followed in Shiah states.

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[1] *Radd-ul-Muhtâr*, Vol. II. p. 980.

[2] *Ibid*, p. 981.

[3] Ten months according to the modern rule.

[4] *Sharâya*, p. 288.

CHAPTER XV.

THE STATUS OF INFANCY.—PERSONAL EMANCIPATION.—EMANCIPATION OF PROPERTY.—INDIAN ACT IX OF 1875.

THE disabilities under which minors labour are not peculiar to the Islâmic Law. In most other systems, the attainment of majority carries with it the personal emancipation of the minors, and also vests in them the capacity of dealing with their property in any way they choose; but under the Mussulman Law *personal* emancipation does not necessarily lead to an emancipation of property.

Two distinct periods of majority.

As a matter of fact, the Islâmic system recognises two distinct periods of majority,—one of which has reference to the emancipation of the person of the minors from the *patria potestas*, and the other to the assumption by them of the management and direction of their property.

These two periods are designated as *bulûgh* and *rushd*, the age of puberty and the age of discretion.

Among the Hanafîs and the Shiahs, puberty is presumed on the completion of the fifteenth year; among the Mâlikîs on the completion of the eighteenth year. The Hanafîs and the Shiahs generally consider *rushd* (discretion) and *bulûghiyèt* (puberty) to go together, and therefore the personal emancipation of minors, which occurs on their attaining puberty, carries with it the emancipation of their goods from the hands of their guardians. They then become entitled to take over the charge of their own property.

There are cases, however, in which a boy or a girl may have arrived at puberty and may yet not be sufficiently discreet (possessed of understanding) to assume the direction of his or her property. In such cases, the Mahommedan Law separates the two ages of majority, and whilst according to the minor personal emancipation from the right of *jabr*, takes care, in the minor's own

interest, to retain the administration of his or her property in the hands of the legal guardian.

If a minor should not be discreet at the age of puberty, he or she is presumed to be so on the completion of the eighteenth year, unless there is any direct evidence to the contrary.

The principle of two distinct, and yet concurrent, periods of majority has been adopted in the Indian Majority Act (Act IX of 1875). Section 2, cl. *a* of that Act, declares "Nothing herein contained shall affect the capacity of any person to act in the following matters, (namely) marriage, dower, divorce, and adoption." Section 3 provides that, "subject as aforesaid," every minor who should not be a ward of Court, whether under Act XL of 1858,[1] or the Court of Wards Act (B.C.), should be deemed to attain his or her majority on the completion of the eighteenth year, and "not before." But every minor of whose *person* or *property* a guardian "has been" or shall be appointed by a Court of Justice, and every minor under the jurisdiction of the Court of Wards "shall be deemed to have attained his majority, when he or she shall have completed the age of twenty-one years, and not before."

It will be seen, therefore, that as far as the principle of the Act is concerned, it is analogous to the principle of the Mahommedan Law in recognising two distinct periods of majority,—one for the emancipation of the person of the minor, the other for the emancipation of the property of such minor. Instead of leaving the age of *rushd*, when the management of the minor's property should be confided to him, in a variable condition, it has fixed, in the case of all minors for whom a guardian has not been appointed by a Court of Justice, or who are not under the jurisdiction of the Court of Wards, the age of eighteen as the age of discretion or majority.

In the case of those minors for whom a guardian has been appointed by a Court of Justice, it goes beyond the Mussulman Law, and does not allow the emancipation of their property until they have completed the twenty-first year.

As far, however, as the personal emancipation of minors is concerned, the Act leaves untouched the provisions of the Mussulman Law. It has specially excepted from its operation the capacity of the Mahommedans "to act in the matters," to use the phraseology

[1] Now repealed by Act VIII of 1890 (The Guardian and Wards Act).

of the statute, "of marriage, dower, and divorce." The extension, therefore, of the age of minority by the Act does not extend the duration of the right of *jabr*.

The father's power to impose the status of marriage upon his minor children cannot be exercised, the Act notwithstanding, after the completion of their fifteenth year or on their arriving at puberty.

Similarly, they can, if Hanafîs or Shiahs, enter into contracts of marriage without the consent of their guardians ;[1] and if any contract of marriage be entered into on their behalf, it is dependent on their express ratification.

In the case of a minor contracted in marriage by a guardian other than the father or grandfather, a doubt arises as to whether he or she would be bound to exercise the *khyâr-ul-bulûgh* ("the right of option") on the completion of the fifteenth year, or whether the right would come into operation after the completion of the eighteenth year. It would appear from the wording of the Act, that as the provisions of the Mahommedan Law regarding the capacity of persons in matters of marriage, dower, and divorce are left intact, a minor so contracted in marriage may validly exercise the right of option on arriving at puberty. Should the right not be exercised then, it is difficult to suppose that it would fall to the ground, or that its not being exercised would be construed to imply acquiescence. As the Act declares that minority should extend in certain cases up to the eighteenth year, and in other cases up to the twenty-first, and as it nowhere says that a right acquired by any exceptional law, if not exercised immediately according to the requirements of that law, should drop, it may perhaps be assumed that no Court of Justice would debar a minor from exercising the *right of option* to cancel a contract of marriage entered into on his or her behalf, by any guardian other than the father or the grandfather, even though it may not be claimed or enforced until after the completion of the age of majority fixed by the Act.

Under the Mussulman Law, every individual upon attaining puberty is vested with the power or capacity of entering validly into *legal transactions* of every kind affecting his or her status, as well as his or her property. The Act has postponed the capacity

[1] For Mâlikî doctrines, see chapter on the *Right of Jabr*.

regarding any dealing with property, until after the age specified by the Legislature. But as it makes an exception in the case of contracts affecting the status of individuals, the result is that if a person on arriving at puberty were to enter into a contract of marriage and *make a settlement*, such a settlement would be valid, as a necessary consequence of the marriage-contract. In the same way, the statute leaving untouched the power of divorce under the Mahommedan Law, if a Mussulman husband, who was an adult under the Mussulman Law and a minor under the Act, were to exercise his power and divorce his wife, he would make himself legally liable for the dower, though the Act would protect him from incurring any liability which did not arise from any contract or breach of contract affecting status. These are some of the difficulties which are not unlikely to arise under the Indian Majority Act, owing to the exceptional clause referred to.

There are other difficulties to which attention may briefly be directed. The statute, it will be remembered, applies to all persons domiciled in British India. There are cases, however, in which a Mussulman, native of Arabia, Persia, Afghanistan, or Turkey, may acquire a domicil in British India, without expressly abandoning his original domicil. In such cases, it is almost impossible to ascertain, with any degree of certainty, whether the person in question has any definite intention of permanently residing in British India. The Persian community in Calcutta furnish the best example of the difficulty suggested. Most of them have been settled in the Presidency-town and its suburbs for several generations. They work and live and intermarry there ; but none of them seem to have abandoned the intention of, some time or other, returning to their mother-country. It is somewhat doubtful how the question of majority would be governed with reference to them. As yet there has arisen no case among them to enable the Courts to pronounce authoritatively whether they should be considered domiciled in British India or not. Probably, when the matter actually comes before the Courts, there will be no difficulty in deciding in the affirmative.

As the Mâlikîs presume puberty only on the completion of the eighteenth year, there is less likelihood of a conflict between their doctrines and the direct provisions of the Act, or the indirect conclusions or results which may spring from it. For example, in the

case of a Mâlikî minor, for whom no guardian has been appointed by a Court of Justice, or who is not subject to the Court of Wards, the legal disability under the Act as well as the Mâlikî Law would expire simultaneously, and the minor in question would acquire the direction and management of his property together with his personal emancipation. If he be a ward of Court, the emancipation of his property from tutelage would be deferred three years. A Shiah or Hanafî minor, on the contrary, would not acquire the control of his property, in one case until three and in the other until six years after the attainment of his majority under his own law.

CHAPTER XVI.

GUARDIANSHIP OR TUTELAGE.—ITS OBJECT AND SCOPE UNDER THE MAHOMMEDAN LAW.—THE FATHER THE PRIMARY GUARDIAN.—TESTAMENTARY GUARDIANS.—INDIAN ACT IX OF 1880.

GUARDIANSHIP or tutelage comprehends (1) the direction or care of the person of the infant, and this arises when the *hizânat* and the guardianship are vested in one and the same person ; (2) a simple supervisory direction over the person of the infant, when the *hizânat* is vested in another person ; and (3) the administration and care of the property of the minor.

In pre-Islâmic times, the preservation and management of the goods of minors were confided to tutors or guardians taken from among the members of the family ; but in the absence of all public authority to exercise a salutary control over them, cases of misappropriation and embezzlement were so frequent, as to necessitate the introduction of most stringent rules for the protection of minors in the Islâmic legislation.

The Koran teems with denunciations against the gross malpractices frequent throughout the Peninsula at the time of the Prophet; and the rules contained in it furnish the foundation for the Mussulman Law on the subject of guardians and wards. The following passages contain some of the rules bearing on the subject, and throw considerable light on the condition of morals in Arabia, about the sixth and seventh century of the Christian era.

"Restore to the orphans," says the Koran, "when they come of age, their *substance* ; do not substitute bad or good,[1] nor devour their substance by adding it to your own, for this is an enormous ne."[2]

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[1] "That is, Take not what ye find of value among their effects to your own use and give them worse in its stead."—Baizâwî.

[2] Koran, chap. iv, v. 2.

It forbade the waste of the property of wards by their guardians,[1] and directed that the tutors may take a reasonable and moderate gratuity for the labour, but not more ; " Let him who is rich abstain entirely from the orphan's estate, and let him who is poor take thereof according to what shall be reasonable."[2]

It further imposed on the guardians the duty of rendering accounts. " And when ye deliver unto your wards their property, call witnesses thereof in their presence. Surely they who devour the possession of orphans unjustly shall swallow fire hereafter."[3]

It was also ordained that the Kâzi should exercise a vigilant supervision over the guardians in the management of their wards' property.

In consequence of the principles which regulate the right of guardianship being based essentially on the express teachings of the Koran, there is little room for divergence between the Shiahs and the Sunnis on this branch of Mussulman jurisprudence.

Guardians are either *natural*, *testamentary*, or *appointed*.

The first and primary natural guardian is the father. Among the Hanafîs, when the father is dead, the guardianship of his minor children devolves upon his executor. When he has died without appointing an executor, but his own father is alive, the tutelage of the minor children is allowed to the grandfather ; when the grandfather also is dead, the guardianship devolves on *his* executor. Among the Shiahs, if the grandfather is alive, he is entitled to the guardianship in preference to the father's executor. In default of the natural as well as the testamentary guardians, *viz.*, the father and his executor and the grandfather and his executor, the obligation of appointing a tutor or curator, for the preservation and management of the minors' property, rests on the Kâzi or Judge as the representative of the government or " Sultan." Among the Hanafîs, if a person, sufficiently qualified to undertake the guardianship of the minors, can be found among the male agnates of the deceased father, such person should be appointed by the Kâzi in preference to a stranger, but no relative other than the father or grandfather

[1] *Ibid*, chap. iv, v. 156.

[2] Or, as Baizâwî explains, " no more than what shall be sufficient recompense for the trouble of education and pupilage."—Chap. iv, v. 6. Sale.

[3] Koran, chap. iv, v. 6.

has any right to interfere in any way with the property of a minor, unless appointed by the Judge.[1]

The Guardians and Wards Act gives to the Judge the power of appointing anybody, but section 17[2] lays down rules which bring the provisions of the Act into line with those of the Mussulman Law.

The father has, at all times, the amplest power to make by will such dispositions, as he may think best relative to the guardianship of his minor children and the protection of their interests.

In order to be valid, however, the appointment of an executor or a testamentary guardian must be made by the father at a time when he is in full possession of his senses. If, at the time of making the appointment, he was in a state of imbecility, or had been for a long time unable to conduct his business owing to mental deficiency, the appointment would be invalid.[3]

Similarly, in order to be valid in law, the appointment must be in favour of a person who is "adult and sane." If the guardian appointed by the father is a minor or a lunatic, the appointment is *ipso facto* void, and all acts committed by the minor guardian, before his removal by the Judge, in exercise of the authority received from the testator are inoperative in law.[4]

If the guardian becomes imbecile or insane after the appointment, the tutelage conferred by the father is voided, and the right of appointing a guardian devolves on the Kâzi.

Whether a minor who is appointed a guardian, and is not removed from his office by order of the Judge, would validly exercise the rights of guardianship on attaining majority is a question on which there seems to prevail great divergence of views. Abû Hanîfa replies in the negative. Abû Yusuf and Mohammed and the Western Imâms hold a contrary opinion, and think that if the minor is not removed from the guardianship before attaining majority the power granted by the testator re-vests in him on his becoming *sui juris*.[5] This opinion is in force among the Indian Hanafîs.

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[1] *Fatâwa Alamgiri*, Vol. VI, p. 223.

[2] See *ante*, p. 261.

[3] See the judgment of the Kâzi of Tlemcen, dated the 30th of December 1863; 1 Sautayra, p. 360.

[4] *Fatâwa Alamgiri*, Vol. VI, p. 214.

[5] *Ibid.*

A *Harbi*[1] (a non-Moslem native of any hostile country at war with the country of the testator) can under no circumstance be appointed the guardian of Moslem children, or the children of the non-Moslem subjects of a Mahommedan State.

The position of a *zimmi*, or a non-Moslem, subject to the same sovereign as the testator, is different. Under the Hanafi Law, if a *zimmi* is appointed a guardian, he can validly exercise his authority and the powers given to him by the deceased, until he is removed by the Judge. It is in the discretion of the Kâzi whether he should be removed or not, though it is recommended in the interest of the minors that he should be removed.[2] All acts committed by him in exercise of his power are lawful, until the appointment is cancelled by the Kâzi.[3] A *zimmi*.

Among the Mâlikîs and the Shâfeïs, a *zimmi* may lawfully be appointed the guardian of the property of minors, though not as the guardian of their person.

Under the Shiah Law, the question is involved in great doubt and difficulty. The *Jâmaa-ush-Shittât* says in matters of guardianship a *zimmi* stands on the same footing as a *harbi*. Probably this may be construed to refer to the guardianship of the person of the infants.

But when the mother is the testamentary guardian, she may, though a non-Moslemah, validly exercise, according to all the schools, the rights of guardianship over the person as well as the property of the minors. The Shiahs make an exception as to the right of *jabr*.

The appointment by the testator of his own slave as the guardian of his infant children is valid in law; but if the appointee is another man's slave, or if some of the testator's children are adult, the appointment is, in the first case, void, and in the other voidable, and liable to be annulled by the Judge.

The appointment of a "profligate," that is, a person who bears notoriously a questionable character in the public walks of life, *from whom danger may be apprehended to the interests of the minor*,

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[1] Baillie translates this word as *alien*. As a matter of fact, the term signifies "a resident of the *Dâr-ul-Harb*," as contradistinguished from the *Dâr-ul-Islâm*. See Chap. II on the *Conflict of Law*.

[2] D'Ohsson, p. 124.

[3] *Fatâwa Alumgiri*, Vol. VI, p. 211; *Kanz-ud-Dakâik*.

is invalid and liable to be set aside by the Judge, under the Shiah as well as the Hanafî Law. But all acts committed by such a person before cancellation of his appointment are lawful if not transparently fraudulent.[1] Subject to the foregoing conditions, the father can appoint at his discretion a man or a woman, a relative or a stranger, to be the guardian of his minor children. His choice cannot be impugned, except on the ground that the tutor so appointed is acting prejudicially to the interests of the wards.

When the Kâzi has appointed a curator (or *mukkaddam*) to take charge of the property of minors, and it subsequently appears that the father had confided the guardianship by his last will and testament to another person, the appointment made by the Kâzi would be withdrawn and the father's choice upheld.[2]

A verbal appointment of an executor, if supported by sufficient testimony, is valid in law.

Mother's guardianship.

A mother is not a natural guardian. She is entitled to the custody of the persons of her minor children, but she has no right to the guardianship of their property. If she deals with their estate without being specially authorised by the Judge or by the father, her acts should be treated as the acts of a *fazûlî*. If they are to the *manifest* advantage of the children they should be upheld; if not, they should be set aside.

A mother, therefore, whether Moslemah or non-Moslemah, can be validly appointed executrix of the father, and when so appointed is entitled to exercise the rights and powers which the law vests in testamentary guardians.

A testamentary guardian stands in *loco patris* in every matter relating to the welfare of the minors and the care and preservation of their property. In certain cases, and especially when the appointment of the *wasî* or executor is *general in its nature*, the father's or grandfather's executor may delegate the trust to his own *executor*.[3]

In Algeria, however, the Kâzis have held that such delegation, in order to be operative, must be confirmed by the Kâzi or Judge.

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[1] *Jâmaa-ush-Shittât; Fatâwa Alamgiri*, Vol. VI, p. 212.

[2] See the judgment of the Court of Algiers, dated 29th January 1863.—Sautayra. "If a Judge, not knowing that the deceased has appointed an executor, appoints another, the executor of the deceased is the lawful executor, and not the nominee of the Judge."—*Fatâwa Alamgiri*, Vol. VI, p. 213.

[3] *Fatâwa Alamgiri*, Vol. VI, p. 223; *Jâmaa-ush-Shittât*.

The mother has no right to appoint a guardian for her minor children. In the case of legitimate children, the power of appointing a tutor to take charge of their property belongs exclusively to the father; in the case of illegitimate children, to the Kâzi or Judge. But when the mother acts as the general executrix of the father, she may validly leave by will the charge of the children to her own executor.

When, however, an executor has been appointed by the mother to take charge of her minor children, and also of movable and immovable property left by her, such executor has no power to sell anything that the minors may have inherited from their father, whether real or personal, or whether the property was involved in debt or not. But he may lawfully dispose of, for the benefit of his wards, the movable property inherited by them from their mother, *but not the immovable property*.[1] If the estate left by her is involved in debt, and the debt is such as to absorb the whole estate, he is authorised to sell the entire property, but not otherwise.[2]

When a guardian has been appointed by a Court of Justice, or there is a testamentary guardian, the mother has no right to interfere with the administration of the estate of the minor. She is at all times, however, entitled to institute a suit in her own name for the protection of the interests of her children. When, therefore, a guardian is dealing fraudulently with the property of the minors, or is embezzling or wasting their estate, she has a right to ask for the assistance of the Judge to remove or restrain him.

The Mahommedan Law carefully and jealously defines the powers and duties of guardians, natural, testamentary, or appointed.

A guardian is authorised to sell the movable property of his ward for an *adequate* consideration, and invest the proceeds in a "profitable undertaking" for the benefit of the minor. "A guardian may sell or purchase movables on account of his ward, either for an equivalent, or at such a rate as to occasion an inconsiderable loss, but not at such a rate as to make the loss great and apparent, because the appointment of an executor being for the benefit of the orphan, he must avoid losses in as great a degree as possible; but

[1] "Nor," adds the *Fatâwa*, "lawfully buy anything but food (*at-taâm*) and raiment (*al-kiswat*)."—*Fatâwa Alamgiri*, Vol. VI, p. 223.

[2] *Fatâwa Alamgiri*, Vol. VI, p. 223.

with respect to an inconsiderable loss, as in the commerce of the world it is often unavoidable, it is therefore allowed to him to incur it, as otherwise a door would be shut to the business of purchase and sale."[1] Similar opinions are expressed in the *Jâmaa-ush-Shittât* and the *Radd-ul-Muhtâr*.

Inadequacy of consideration, which on the face of it bears the marks of fraud, or when the inadequacy is so *considerable* as to occasion serious injury and detriment to the interests of the minor, or when it is the result of culpable negligence on the part of the guardian, will avoid any transaction entered into by him on behalf of the ward, and make him liable for its consequences. It remains, however, for the Kâzi in his discretion to consider whether a consideration is adequate or not, or whether a particular transaction shall be held to be prejudicial to the interests of the ward or otherwise. If the transaction has been entered into *bonâ fide* with due care and attention, the guardian would not be held responsible for any untoward consequences which may have resulted from it, contrary to his expectation and forecast.

A guardian is allowed to borrow money for the *support and education* of his ward, even if he have to pledge the minor's property. All debts contracted *validly* and *bonâ fide* for that purpose, must be paid out of the minor's estate, or by the minor when he or she comes of age.

It is lawful for a guardian to trade on account of his ward, but in doing so he must be careful not to speculate beyond the bounds of *ordinary prudence*, or to engage in transactions which he has reason to believe are hazardous in their nature.[2]

A guardian is bound to keep his accounts separate from those of his ward, when the capital of both is engaged in the same trade or business.

A testamentary guardian, or a curator appointed by the Kâzi, is not allowed to pledge the goods of his ward "*into his own hands*" *on account of a debt due to himself*, nor "into the hands" of any person over whom he exercises control or parental authority; "for a guardian, being merely an *agent*, cannot of course have a double capacity in contracts."[3]

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[1] *Hedâya*, Vol. IV, p. 553. [2] *Fusûl Imâdiya.*
[3] *Hedâya*, Vol. IV, p. 214.

According to the *Hedâya*, a father *may pledge* the *movable* property of his minor child to himself for a debt due from the child to himself, or he may pledge it to another on account of a debt of his own, remaining, however, always liable for the value of the goods to the child.[1]

Other jurists seem to disagree with the author of the *Hedâya* in this latter view. According to them, the father stands in the same position as any other guardian ; that is, it is not lawful either for him or for a tutor to pay off his own personal debts with the goods of the minor, or to pledge them on account of debts.[2]

Some jurists think that it is lawful for the father to pledge the goods of his son for a debt jointly incurred by father and son. If, therefore, the pledged goods be lost, a father is bound "to compensate his son by the payment of a sum equivalent to his own share of the debt."

Abû Yusuf and several others have doubted the correctness of this view, holding that the father has no right to mix up his own property with that of his child, or to pledge the latter for a debt due from both, as "this is likely to lead to confusion."

These principles have reference to movable property alone. With reference to the *real* or *immovable* property of the ward, the powers of guardians are more limited and circumscribed.

(*a*) A guardian *may not sell* his ward's real property "into his own hands" or into the hands of anyone connected with him, under any circumstance.

(*b*) He may sell it to a *stranger* for double its value, or where it is to the *manifest* advantage of the ward.

(*c*) He may also sell it when there are some general provisions in the *wasiat* (will) of the testator, which cannot be carried into effect without the sale of the property.

(*d*) When the property is required to be sold for the purpose of paying off the debts of the testator, which cannot be liquidated in any other way.

(*e*) When the income accruing from the estate is not sufficient to defray the expenditure incurred in its management and the payment of the *kharâj* (land revenue).

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[1] *Hedâya*, Vol. IV, p. 215.

[2] *Durr-ul-Mukhtâr*, p 846 ; *Jâmaa-ush-Shittât* ; 4 *Hedâya*, Bk. xlviii, chap. ii

(*f*) When it is in imminent danger of being destroyed or lost by decay.

(*g*) When the minor has no other property, and the sale of it is *absolutely* necessary for his maintenance.

(*h*) When it is in the hands of a usurper, and the guardian has reason to fear there is no chance of restitution.[1]

If the immovable property of a minor is sold *bonâ-fide* for an adequate consideration, with the object of investing the proceeds safely and for an increased interest, its sale would be held valid upon a liberal construction of the law.[2]

Bukshan v. Maldai Kooeri.

In the case of *Bukshan* v. *Maldai Kooeri*,[3] the High Court of Calcutta held that, under the Mahommedan Law, a sale by a guardian of the property of a minor is permitted only in case of urgent necessity or clear advantage to the ward, and a purchaser from the guardian cannot defend his title on the ground of the *bona fides* of the transaction ; nor could an elder brother stand in the position of such a guardian in respect of the property of his minor sisters.

Syedun v. Velayet Ali Khan.

In *Syedun* v. *Velayet Ali Khan*,[4] the Calcutta High Court proceeded further and declared, what is in perfect accordance with the Mahommedan Law, that in cases of sale made by the guardian of a Mahommedan ward, the question of legal necessity does not necessarily arise, though it may properly form an element for consideration when the conduct of a guardian is called in question. What the Mahommedan Law looks to is the benefit of the minor, and permits the guardian to dispose of movable property if it be for the benefit of the minor. In this particular case the sale was upheld, as it was to carry on an important litigation for the minor and was for his benefit.

Husaini Begam v. Zia-ul-nissa Begam.

In *Husaini Begam* v. *Zia-ul-nissa Begam*,[5] the Bombay High Court seem to have stretched the point somewhat in order to sustain a transaction entered into by the elder brother of the minor with the sanction of an officer of Government. In this case, however, the ancestor had died heavily involved in debt, and the distressed

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[1] *Fatâwa Alamgiri*, Vol. VI, p. 222; *Jâmaa ush-Shittât ; Kitâb-ul-Anwâr ; Durr-ul-Mukhtâr*, p. 846.

[2] *Radd-ul-Mukhtâr ; Jâmaa-ush-Shittât.*

[3] 3 B. L R., A. C., p. 423 ; S. C , 12 W. R., p. 337. See also *Rutton* v. *Doomee Khan*, 3 Agra. p. 21, where it was held that brothers were not such guardians.

[4] 17 W. R., p. 239.

[5] I. L., 6 Bom., p. 467.

condition of his heirs existed in a sufficient degree to justify the sale of the whole property of his heirs. But it was overlooked that the sanction to such a transaction could only be given by the judicial authority.

Bhuthnath Dey v. Ahmed Hossain.

The Calcutta High Court, in the case of *Bhuthnath Dey* v. *Ahmed Hossain*,[1] applied the law correctly in holding that a mortgage created by the adult co-heirs of certain Mahommedan minors in respect of their own shares, as well as those of the minors for the purpose of paying off the arrears of rent of a patni talook, did not bind the shares of the minors.

But the reservations made by the High Court in deciding the question of law seem to be beside the point.

Hasan Ali v. Mehdi Husain.

In the Allahabad High Court there has existed considerable divergence of opinion regarding sales by guardians. In *Hasan Ali* v. *Mehdi Husain*,[2] the sale was upheld. In another case the sale, which was for the purpose of paying off an ancestral debt, was set aside, but subject to the minor paying a share of the debt proportionate to the share received by her in the inheritance of her father.[3]

Sitaram v. Amir Begum.

In *Sitaram* v. *Amir Begum*,[4] the Mahommedan Law was enunciated with considerable distinctness by Mahmood, J., who held the transaction entered into by a *de facto* guardian not binding on the minors.

Kali Dutt Jha v. Abdul Ali.

In the case of *Kali Dutt Jha* v. *Abdul Ali*,[5] the Judicial Committee of the Privy Council upheld a sale by a guardian of the ward's property on the ground that it was made to settle disputes, and was to the advantage of the minors, besides being for a fair price.

As a general rule, the powers of the testamentary guardian are subject to the same limitations, and extend to the same degree as the powers of the testator.

The Shiah Law is in general accord with the Sunni Law regarding the powers of guardians. A few of the general principles stated in the *Mabsût* may usefully be inserted here :—

(1) The testamentary guardian or executor must be major, sane, professor of Islâm, and of good manners.

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[1] I. L., 11 Cal., p. 417.
[2] I. L., 1 All., p. 533.
[3] I. L., 1 All., p. 57.
[4] I. L., 8 All., p. 324.
[5] I. L., 16 Cal., p. 627 ; S. C., L. R., 16 I. A., p. 96.

(2) A minor cannot be appointed a guardian or executor by himself, but may validly be appointed with another. In the last case, he can act only on attaining majority.

(3) In the preceding case the adult tutor can act singly up to the majority of the minor guardian.

(4) A woman can be appointed an executrix or a testamentary guardian of minors.

(5) A *zimmi* cannot be appointed the guardian of Moslem children.

(6) The testamentary guardian cannot delegate the guardianship to his own executor, unless expressly authorised by the testator.

(7) If the grandfather is alive the father cannot leave the guardianship of his minor children to an outsider, unless the grandfather is notoriously inimical to the interests of his grandchildren.

The provisions of the Mussulman Law relating to the appointment of guardians and their powers and duties must be read side by side with the provisions of Act IX of 1880 (the Guardian and Wards Act).

Section 20 of the Act declares the fiduciary character of the guardian towards the ward, and impresses on his dealings with his ward's property the obligations which spring from that character.

Sections 24, 25 and 26 lay down rules regarding the custody of the minor by one appointed under the Act as guardian of the person.

Sections 27 and 28 prescribe the duties and the limitations on the powers of guardians to deal with the property of their wards.

Section 30 declares the voidability of transfers made by the guardians otherwise than with the sanction of the Court. And section 31 lays down the procedure for obtaining the sanction of the Court for a transfer by the guardian, and the circumstances under which such permission may be granted.

Section 33 allows the guardian to apply for the advice or opinion of the Court in the management of the ward's property.

Abbasi Begum v. Rajrup Koer.

In the case of *Abbasi Begum* v. *Rajrup Koer*,[1] it was decided by Ainslie and Macdonnell, JJ., that a guardian *de facto*, who had not taken out a certificate under Act XL of 1858, had no larger powers than a guardian *de jure* duly appointed under it. In a later case, however, a Full Bench of the Court have held a contrary

[1] I. L. 4 Cal. 33.

view. They have decided that it is only when a guardian takes out a certificate, that his or her power becomes circumscribed within the limits imposed by Section 18 of Act XL of 1858. The position and powers, therefore, of a Mahommedan guardian, testamentary or natural, not appointed by the Court under the new Act, will be judged by the principles of the Mahommedan Law. But, as has already been amply shown, the Mussulman Law is extremely solicitous for the interests of minors. There can, therefore, be little doubt that the Courts in India will be guided in the determination of questions arising in Moslem families, by the equitable principles of construction adopted by the Algerian Kâzis and the Court of Algiers.

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